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In the
Supreme Court of the United States
OCTOBER TERM, 1978

JAYS FOODS, INC. and NIELSEN BROTHERS CARTAGE CO., INC.,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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The Committee of Conference, House Report No. 510, June 3, 1947 (reported in U.S. Code Congressional Service, 80th Congress, First Session, 1947, at pages 1159-1160, 1161, 1162-1163), reflecting the Congressional intent as it relates to the amendments to Sections 10(b), 10(c), 10(e) and 10(f) of the NLRA effectuated by the Labor Management Relations Act of 1947 (29 U.S.C.A. Sections 160 (b), (c), (e) and (f)) 6, 7-11, 12, 16

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No.

JAYS FOODS, INC. and NIELSEN BROTHERS CARTAGE CO., INC.,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To: The Honorable Chief Justice and Justices of the Supreme Court of the United States:

Jays Foods, Inc., petitioner herein, respectfully petitions for a Writ of Certiorari to review the decision and judgment order of the United States Court of Appeals for the Seventh Circuit in the within entitled cause in connection with the Petition For Review heretofore filed by the Petitioners, and the cross-application for enforcement heretofore filed by the National Labor Relations Board, with said Court of Appeals.

OPINIONS & PROCEEDINGS BELOW

This cause arises from the trial before the National Labor Relations Board of three (3) consolidated unfair labor practice complaints instituted against Jay Foods, Inc. (hereinafter sometimes referred to as Jays) and Nielsen Brothers Cartage Co., Inc. (respondents in the proceedings before the NLRB), charging Jays (in Case No. 13-CA-14889), a manufacturer of snack food products, particularly potato chips, with discontinuing its cartage operations, selling its trucking equipment used in connection therewith, contracting out its cartage operations to Nielsen, and discharging its tractor-trailer drivers, because of alleged union activities upon the part of said tractor-trailer drivers; and charging Jays, in a wholly unrelated case (Case No. 13-CA-14995) with wrongfully discharging one of its salesmen, an Edward Olson, because of his alleged union activities.

The decision (opinion) of the United States Court of Appeals for the Seventh Circuit, from which review is here sought, was issued on March 15, 1978, is reported at 573 F. 2d 438, and is set forth as Appendix "A", infra, p. 1a. Petitioner's Petition for Rehearing (set forth as Appendix "B", infra, p. 16a) was filed, in timely fashion, on March 29, 1978; and on April 6, 1978 the United States Court of Appeals for the Seventh Circuit entered an order (set forth as Appendix "C", infra, p. 31a) denying said Petition for Rehearing. On May 23, 1978, the United States Court of Appeals for the Seventh Circuit entered its final Judgment Order (set forth as Appendix "D", infra, p. 32a).

The decision and order of the National Labor Relations Board, from which the aforesaid review was taken to the United States Court of Appeals for the Seventh

Circuit, was issued on February 24, 1977, and is reported at 228 N.L.R.B. No. 54 (set forth as Appendix "E", infra p. 36a). Said decision and order of the National Labor Relations Board affirmed the rulings, findings and conclusions of the Administrative Law Judge (set forth as Appendix "F"), and adopted his recommended order as modified by the Board.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S.C.A. Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

The following questions are presented for review:

(1) What is the criteria for and what constitutes "substantial evidence" for purposes of Courts of Appeal determining whether or not the findings of fact, inferences and conclusions made by the National Labor Relations Board in Section 8 (a) (1) and (3) cases are supported by "substantial evidence on the record considered as a whole"?

(2) Section 10(c) of the National Labor Relations Act (29 U.S.C.A. Sec. 160(c), provides, among other things, as follows:

> "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause."

Where an employee is discharged "for cause", and there is evidence tending to show that his discharge was unrelated to his union activities, does the National Labor Relations Board have the authority, in the light of the

specific structures of Section 10(c) of the National Labor Relations Act, as amended, aforesaid, to require the reinstatement of such employee and the payment to him of back pay?

(3) Are the findings, inferences and conclusions of the Administrative Law Judge and the Board, in the instant cause, that Edward Olson, a employee, was discharged because of his union activities supported by "substantial evidence on the record considered as a whole"?

(4) Are the findings, inferences and conclusions of the Administrative Law Judge and the Board, in the instant cause, that Jays subcontracted its cartage operations out to Nielsen and discharged its tractor-trailer drivers because of alleged union activities upon the part of said tractor-trailer drivers, and in connection therewith committed certain unfair labor practices, supported by "substantial evidence on the record considered as a whole"?

(5) What was the criteria used by the Court of Appeals in the instant cause in determining whether or not the findings of fact, inferences and conclusions made by the Administrative Law Judge and the Board are supported by "substantial evidence on the record considered as a whole", and was that criteria a proper one?

(6) Did the Court of Appeals in the instant cause misapprehend, misapply and too narrowly construe the permissible scope of its review and reviewing function as laid down by the Supreme Court of the United States in the *Universal Camera Corp.* case?

(7) Are the remedies provided for in sub-paragraphs 2(a) and 2(b) of the Judgment Order, entered by the Court of Appeals on May 23, 1978, proper and appropriate under the facts and circumstances of this case?

STATUTES (& CONGRESSIONAL REPORTS RELATING THERETO) & REGULATIONS INVOLVED.

Sections 10(b), 10(c), 10(e) and 10(f) of the National Labor Relations Act, as amended by The Labor Management Relations Act of 1947 (29 U.S.C.A. Sec. 160(b), (c), (e) and (f)) are set forth verbatim in Appendix "G" (infra, p. .....).

Section 10(c) of the Act provides, in pertinent part, as follows:

> " . . . *If upon the preponderance of the testimony taken* the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair Labor practices, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practices, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act..... *If upon the preponderance of the testimony* taken the Board shall not be of the opinion that the person named in the complaint has engaged or is engaging in any such unfair labor practice then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. *No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause . . .*" (Emphasis ours)

Sections 10(e) and (f) of the Act both provide, in essence, that "the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."

Section 10(b) of the Act provides, in pertinent part, that proceedings before the Board "shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28."

Title 5, Section 706 of U.S.C.A. (dealing with judicial review of administrative proceedings) is set forth verbatim in Appendix "G" (infra, p. .....), and in essence provides, in pertinent part, that the reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be "(E) unsupported by substantial evidence . . ."

Section 101.10(b)(1) of the Board's regulations dealing with "Statements of Procedure, Series 8" in connection with hearings before the Administrative Law Judge (found in 29 CFR, Sec. 101.10(b) (1) provides as follows:

> "(1) No sanction is imposed or rule or order issued except upon consideration of the whole record or such portions thereof as may be cited by any party and *as supported by and in accordance with the preponderance of the reliable probative, and substantial evidence;*" (Emphasis ours)

The Committee of Conference, House Report No. 510, June 3, 1947 (reported in U.S. Code Congressional Service, 80th Congress, First Session, 1947, at pages 1159-1160, 1161, 1162-1163), reflecting the Congressional intent as it relates to the amendments to Sections 10(b), 10(c), 10(e) and 10(f) of the NLRA effectuated by the Labor Management Relations Act of 1947 (29 U.S.C.A.

Sections 160(b), (c) (e) and (f)), reads, in pertinent part, as follows:

> "(6) The House bill provided, in section 10(b); that proceedings before the Board should be conducted, so far as practicable, in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure. The Senate amendment retained the language of the present act, which provides that the rules of evidence prevailing in the courts shall not be controlling. The reason for this provision in the House bill was explained in full in the committee report on the bill. *If the Board is required, so far as practicable, to act only on legal evidence, the substitution, for example, of assumed 'expertness' for evidence will no longer be possible.* The conference agreement in section 10 (c) contains this provision of the House bill."
>
> "(7) In section 10(c) the House bill provided that the Board should base its decisions upon the "weight of the evidence". The Senate amendment retained the present language of the act, permitting the Board to rest its orders upon "all the testimony taken". *The conference agreement provides that the Board shall act only on the "preponderance' of the testimony—that is to say, on the weight of the credible evidence. Making the "preponderance" test a statutory requirement will, it is believed, have important effects. For example, evidence could not be considered as meeting the "preponderance" test merely by the drawing of "expert" inferences therefrom, where it would not meet that test otherwise. Again, the Board's decisions should show on their face that the statutory requirement has been met—they should indicate an actual weighing of the evidence, setting forth the reasons for believing this evidence and disbelieving that, for according greater weight to this testimony than to that, for drawing this inference rather than that. Immeasurably in-*

creased respect for decisions of the Board should result from this provision."

• • •

"(10) *The House bill also included, in section 10(c) of the amended act, a provision forbidding the Board to order reinstatement or back pay for any employee who had been suspended or discharged, unless the weight of the evidence showed that the employee was not suspended or discharged for cause.* The Senate amendment contained no corresponding provision. *The conference agreement omits the "weight of evidence" language, since the Board, under the general provisions of section 10, must act on a preponderance of evidence, and simply provides that no order of the Board shall require reinstatement or back pay for any individual who was suspended or discharged for cause. Thus employees who are discharged or suspended* for interfering with other employees at work, whether or not in order to transact union business, or for engaging in activities, whether or not union activities, contrary to shop rules, or for Communist activities, or *for* other *cause* (see Wyman-Gordon v. N. L. R. B., 153 Fed. (2) 480), *will not be entitled to reinstatement.* The effect of this provision is also discussed in connection with the discussion of section 7."

• • •

"(14) Under the language of section 10(e) of the present act, findings of the Board, upon court review of Board orders, are conclusive if supported by evidence. By reason of this language, the courts have, as one has put it, in effect 'abdicated' to the Board (N. L. R. B. v. Standard Oil Company, 138 F.2d 885 (1943)). See also: Wilson & Co. v. N. L. R. B. (126 F.2d 114 (1942)), N. L. R. B. v. Columbia Products Corp. (141 F.2d 687 (1944)), N. L. R. B. v. Union Pacific Stages, Inc. (99 F.2d 153). In many instances deference on the part of the courts to specialized knowledge that is supposed to inhere in administrative agencies has led the courts to acquiesce in decisions of the Board, even when the findings concerned mixed issues of law and of fact (N. L. R. B. v. Hearst Publications, Inc., 322 U.S. 111; N. L. R. B. v. Packard Motor Car Co., decided March 10, 1947), or when they rested only on inferences that were not, in turn, supported by facts in the record (Republic Aviation v. N. L. R. B., 324 U.S. 793; Le Tourneau Company v. N. L. R. B., 324 U.S. 793)."

"As previously stated in the discussion of amendments to section 10(b) and section 10(c), *by reason of the new language concerning the rules of evidence and the preponderance of the evidence, presumed expertness on the part of the Board in its field can no longer be a factor in the Board's decisions.* While the Administrative Procedure Act is generally regarded as having intended to require the courts to examine decisions of administrative agencies far more critically than has been their practice in the past, by reason of a conflict of opinion as to whether it actually does so, a conflict that the courts have not resolved, there was included, both in the House bill and the Senate amendment, language making it clear that the act gives to the courts a real power of review."

"The House bill, in section 10(e), provided that the Board's findings of fact should be conclusive unless it appeared to the reviewing court (1) that the findings were against the manifest weight of the evidence, or (2) that they were not supported by substantial evidence."

"The Senate amendment provided that the Board's findings with respect to questions of fact should be conclusive if supported by substantial evidence on the record considered as a whole. *The provisions of section 10(b) of the conference agreement insure the Board's receiving only legal evidence, and section 10(c) insures its deciding in accordance with the preponderance of the evidence.* These two statutory requirements in and of themselves give rise to ques-

tions of law which the courts will hereafter be called upon to determine—whether the requirements have been met. *This, in conjunction with the language of the Senate amendment with respect to the Board's findings of fact—language which the conference agreement adopts—will very materially broaden the scope of the courts' reviewing power. This is not to say that the courts will be required to decide any case de novo, themselves weighing the evidence, but they will be under a duty to see that the Board observes the provisions of the earlier sections, that it does not infer facts that are not supported by evidence or that are not consistent with evidence in the record, and that it does not concentrate on one element of proof to the exclusion of others without adequate explanation of its reasons for disregarding or discrediting the evidence that is in conflict with its findings. The language also precludes the substitution of expertness for evidence in making decisions.* It is believed that the provisions of the conference agreement relating to the courts' reviewing power will be adequate to preclude such decisions as those in N. L. R. B. v. Nevada Consol. Copper Corp. (316 U.S. 105) and in the Wilson, Columbia Products, Union Pacific Stages, Hearst, Republic Aviation, and Le Tourneau, etc., cases, supra, without unduly burdening the courts. The conference agreement therefore carries the language of the Senate amendment into section 10(e) of the amended act."

• • •

(16) The conference agreement makes the same change in section 10(f) concerning the conclusiveness of the Board's findings as is made in section 10(e)." (Emphasis ours)

STATEMENT OF THE CASE

I. The Reasons Why Writ Of Certiorari Should Be Granted.

Twenty seven (27) years have elapsed since the Supreme Court in *Universal Camera Corp.* v. *N.L.R.B.*, 340

U.S. 474, 477-492, 71 S. Ct. 456, 95 L.Ed. 456 (1951), laid down the rule or standard that findings of fact by the Board (NLRB) with respect to questions of fact should be sustained by the Courts of Appeal only if "supported by substantial evidence on the record considered as a whole."

That standard is admittedly imprecise. As a result, the criteria or tests applied by the various Courts of Appeal in determining what constitutes "substantial evidence on the record considered as a whole" has varied and differed widely to a point (1) where a serious conflict presently exists between the various Circuits as to what are the proper criteria or tests to be applied in determining whether or not the findings of the Board are supported by "substantial evidence on the record considered as a whole", and (2) the Courts of Appeal have not infrequently, as in the instant cause, lost sight of the clear congressional mandate expressed in the Labor Management Act of 1947 (Act of June 23, 1947, c. 120, 80th Cong., 1st Sess., 61 Stat. 136, as amended) that the findings of the Board, to be sustained, must be predicated, *at least*, on the "*preponderance* of the testimony, that is to say, *on the weight of the credible evidence*." See Section 10 (c) of the National Labor Relations Act, as amended, (29 U.S.C.A. Sec. 160 (c); and Committee of Conference, House Report No. 510, June 3, 1947 (reported in U.S. Code Congressional Service, 80th Congress, First Session 1947, pp. 1159-1163).

It is respectfully submitted that the Court of Appeals in the instant cause has misapprehended the criteria or tests for determining what constitutes "substantial evidence on the record considered as a whole", thereby unduly fettering, restricting and limiting the permitted scope of its review and the exercise of its independent judicial judgment; and has misapplied the standard of review set forth in the *Universal Camera* case, *supra*.

Most decisions of the various Courts of Appeal make no attempt to define the criteria or tests by which the Court has determined whether or not the findings of the Board are supported by "substantial evidence on the record considered as a whole", and merely restate the standard imposed by this Court in the *Universal Camera* case, *supra.*

In those cases where the Courts of Appeals have sought to define what is meant by "substantial evidence on the record considered as a whole", or to delineate the criteria or tests for determining that standard, the Courts of Appeal have wound up with variegated, differing and conflicting criteria involving such a differing and wide range or spectrum of proof that the decision in a particular case, particularly a "close case" where there is conflicting evidence, must of necessity turn on and be influenced by the standard of proof that the Court of Appeals applies in reviewing the record.

This disparity in approach is reflected in the following cases.

Thus in *Mead And Mount Construction Co.* v. *N.L.R.B.*, 411 F.2d 1154, 1157 (C.A. 8th, 1969), the Eighth Circuit (before Blackmun, Gibson and Heaney, Circuit Judges) said:

> "At the risk of further complicating an already confused area, we restate what we consider to be the appropriate standards to be followed by Trial Examiners and the Board:
>
> (1) The General Counsel has the burden of proving by a fair preponderance of the evidence that the employee was discharged for his union activities or membership—that but for his union activities or membership, he would not have been discharged.
>
> (2) This burden can be satisfied by direct or circumstantial evidence,

> (3) The Board, in reaching its decision, is permitted to draw reasonable inferences, and to choose between fairly conflicting views of the evidence. It cannot rely on 'suspicion, surmise, implication, or plainly incredible evidence.'" (citing *Universal Camera Corp., supra*)

In *N.L.R.B.* v. *Paschall Truck Lines, Inc.*, 469 F.2d 74, 76 (C.A. 6th, 1972) the Sixth Circuit said:

> "The Supreme Court has defined substantial evidence as more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Consolidated Edison Co. of New York* v. *NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126 (1938). [I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. *NLRB* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300, 59 S.Ct. 501, 505, 83 L.Ed. 660 (1939). This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 620, 86 S.Ct. 1018, 1026, 16 L.Ed. 2d 131 1966); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951). In reviewing the credibility findings and the inferences drawn by the Board from the evidence, the test for a reviewing court is whether the conclusions are reasonable in light of the proven facts. Thus, this Court may not substitute its judgment on the question whether the inference drawn is the correct one or whether a different inference would be better supported, but is limited to the determination of reasonableness—not rightness. *NLRB* v. *Nevada Consolidated Copper Corp.*, 316 U.S. 105, 106, 62 S.Ct. 960, 86 L.Ed. 1305 (1942); *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 48-50, 74 S.Ct. 323, 98 L.Ed. 455 (1954)."

In *Torrington Company* v. *N.L.R.B.*, 506 F.2d 1042, 1047, 1049 (C.A. 4th, 1974), the Fourth Circuit said:

> "Substantial evidence means 'evidence furnishing a substantial basis of fact from which the fact in issue can reasonably be inferred; and the test is not satisfied by evidence which merely creates a suspicion or which amounts to no more than a scintilla or which gives equal support to inconsistent inference.'" (citing cases)

In *N.L.R.B.* v. *Interboro Contractors, Inc.*, 388 F.2d 495, 499 (C.A. 2d, 1967), the Second Circuit said:

> "This court must look at the facts of each case and determine whether the supporting evidence, even if not preponderating in this court's view, nevertheless provides a sufficient basis for the Board's decision.

In *N.L.R.B.* v. *Injection Molding Co.*, 211 F.2d 59, 62 (C.A. 8th, 1954), the Eighth Circuit said:

> "After the Board performs that function (i.e. considers the evidence found in the record as a whole) and determines which of the opposing contentions is supported by the greater weight of the evidence, on submission of the issue of substantiality of the evidence to support the Board's finding, the court's province is confined to a determination of whether on the record as a whole, including of course the Respondent's evidence, the evidence upon which the Board based its finding was substantial. In doing that the court must make a comparison, not for the purpose of determining which contention is supported by the greater weight of the evidence, but in order to determine whether the evidence relied on by the Board is substantial in relation to the whole."

In *N.L.R.B.* v. *Consolidated Diesel Electric Company, etc.*, 469 F.2d 1016, 1021, 1024-1025 (C.A. 4th, 1972), the Fourth Circuit said:

> "In measuring a record for substantial evidence under the Act, it is error to assume that our inquiry should be no further than to ascertain whether there is evidence in the record, which, in and of itself, tends to support the Board's conclusion. Rather we are obliged to scrutinize the whole record, taking into account whatever fairly detracts from the evidence relied upon by the Board. *N.L.R.B.* v. *A. S. Abell Company* (4th Cir. 1964) 327 F.2d 1, 5. In short, the test is whether 'the inferences on which the Board's findings were based were so overborne by evidence calling for contrary inferences that the findings of the Board could not * * * be deemed to be supported by substantial evidence'. *Black Hawk Corporation* v. *N.L.R.B.* (4th Cir. 1970) 431 F.2d 900, 902, cert. den. 401 U.S. 911, 91 S.Ct. 876, 27 L.Ed.2d 810."

In *Midwest Regional Jt. Bd., etc.* v. *N.L.R.B.*, 564 F.2d 434, 438 (C.A. D.C., 1977), the Court of Appeals for the District of Columbia said:

> "Our function is not to overturn the Board's choice between two equally plausible inferences from the facts if the choice is reasonable, even though we might reach a contrary result if deciding the case *de novo*."

Thus while all the courts hold that substantial evidence is "more than a mere scintilla", the Courts appear divided as to whether "preponderance of the evidence" or "weight of the evidence",—the test clearly mandated by Section 10 (c) of the National Labor Relations Act, as amended by the Labor Management Act of 1947,—is a necessary criteria or test for determining whether or not the Board's findings of fact are supported by "substantial evidence on the record considered as a whole."

The "substantiality of evidence" required to sustain the Board's findings of fact is obviously greater if the Board's findings must be supported by a "preponderance of the

evidence", or by the "weight of the evidence", than it would be if the degree of proof required of the Board to sustain its findings of fact on review "is more than a scintilla, but less than a preponderance".

There is a dearth of recognition by the Court of Appeal that Section 10 (c) of the National Labor Relations Act, as amended, requires the findings of fact of the Board to be supported by a "preponderance of the evidence", or the "weight of the evidence", and that the Courts of Appeal, in reviewing the findings of the Board to determine whether or not they are supported by "substantial evidence on the record considered as a whole", must in the first instance satisfy themselves that the Board's findings of fact are supported by *at least* a preponderance of the credible evidence, or the weight of the credible evidence.

Another test sometimes used by some of the Courts of Appeal in determining whether or not the Board's findings of fact are or are not supported by "substantial evidence on the record considered as a whole" is that the Board's findings of fact will be deemed to be supported by "substantial evidence on the record considered as a whole" if there is enough evidence to justify, if the trial were to a jury, a refusal by the Court to direct a verdict. This test apparently had its origins in *N.L.R.B.* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300, 59 S. Ct. 501, 505, 83 L.Ed. 660 (1939), a case antedating the amendments made to the National Labor Relations Act by the Labor Management Relations Act of 1947. Under this test if "substantial evidence" in support of the Board's findings is such relevant evidence as is enough to justify a denial of a directed verdict, if the case were before a jury, then the standard of evidence is apparently satisfied by any evidence supporting the necessary elements of the case, other than a scintilla, regardless of its weight or preponderance. This test would impose a burden on the respondent or employer in a case before the Board far greater than that envisioned or intended by the Congress or this Court in the *Universal Camera* case, *supra,* and would make the findings of fact of the Board immune from effective judicial review in any case where there was minimal evidence, but more than a scintilla, to support the Board's findings. In other words, on a Richter evidentiary scale of 1 to 10, with Number 1 on the scale being a "scintilla of evidence", the standard of proof sufficient to satisfy the substantiality test, would be anything more than the first line of the scale; a standard of proof far less than that envisioned or intended by the Congress, or this Court in the *Universal Camera* case, *supra.*

It is to be noted that the Court of Appeals in the instant cause apparently relies upon *N.L.R.B.* v. *Columbian Co., supra,* as the criteria or standard by which it measures whether or not the findings of the Board are supported by "substantial evidence on the record considered as a whole", saying with reference to the Olson discharge (see Appendix "A", infra, p. .....):

> "There is enough evidence from which a reasonable person might justifiably infer that Olson's discharge was due in part at least to his union activity. *N.L.R.B.* v. *Columbian* Co., 306 U.S. 292, 300, 59 S. Ct. 501, 83 L.Ed. 660 (1939)."

The Courts also appear to be in conflict as to whether or not the "substantial evidence" standard is met where the evidence "gives equal support to inconsistent inferences." *Torrington Company* v. *N.L.R.B., supra,* which holds that the substantial evidence test is not satisfied by evidence "which gives equal support to inconsistent inferences", would appear to provide a proper guideline; given the burden of proof imposed on the Board by Section 10 (c) of the National Labor Relations Act, as amended.

One other point worthy of note in connection with the variegated approach that the Courts of Appeal have taken in applying the substantial evidence standard of the *Universal Camera* case, *supra,* is the sometimes unwarranted deference shown by the Courts of Appeal, as in the instant cause, to findings and conclusions of the Board, even though the Court, from a review of the record as a whole is moved to comment that it might well come to conclusions or inferences different than or contrary to that adopted by the Administrative Law Judge and/or the Board if it were deciding the case *de novo.*

Thus in the instant cause, the Court of Appeals for the Seventh Circuit said at the very outset of its decision (Appendix "A", infra, p. 8a):

> "We find this a close and difficult case in which there is a great deal of conflicting evidence on many of the crucial questions. If we were deciding the case *de novo,* we might very well have made findings and conclusions contrary to some of the Board's determinations. However, we adhere to the limited scope of our review. . . ."

The reluctance of the Courts of Appeals under such circumstances to override the Board's findings, and to make the findings and conclusions that the Court admittedly would have made if the Court were deciding the case *de novo,* reflects the fettered and limited scope of review which the Courts of Appeals sometimes unwarrantly envision as their role in determining whether the findings of fact of the Board and the Administrative Law Judge are or are not supported by substantial evidence on the record considered as a whole.

As this Court said in *Universal Camera Corp.* v. *Labor Board,* 340 U.S. 474, 488, 496, 497 (1951):

> "Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."
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> • • •
>
> "We do not require that the examiner's findings be given more weight than in reason and in the light of judicial experience they deserve."
>
> ". . . it (the Court of Appeals) should accord the findings of the trial examiner the relevance that they reasonably command in answering the comprehensive question whether the evidence supporting the Board's order is substantial."

As Justice Frankfurter said in his dissenting opinion in *N.L.R.B.* v. *Walton Manufacturing Co.,* 369 U.S. 404, 418-419, 82 S.Ct. 853, 7 L.Ed. 2d 829 (1962):

> "The opportunity of the trier of fact to observe the demeanor of witnesses should not be overlooked. But neither should it be overlooked that the Board itself has no opportunity to observe the demeanor of witnesses. Yet the Board is not required to accept a trial examiner's credibility findings, see *Universal Camera Corp.* v. *Labor Board,* 340 U.S. 474, 492-497, and, therefore, neither is the Court of Appeals. Even where the fact-finding function is not divided, due regard for the advantage of the trier of fact does not require appellate impotence. . . . Indeed, this Court has never before required complete deference to credibility findings. *Labor Board* v. *Pittsburgh S. S. Co.,* 337 U.S. 656, does not so hold; a great many findings not so unfounded as to indicate bias are nonetheless reversible error. In *Universal Camera Corp.* v. *Labor Board,* 340 U.S. 474, 490, this Court declared that Labor Board findings must be set aside when the record clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testi-

mony of witnesses or its informed judgment on matters within its special competence or both. A fair estimate of the worth of the testimony hardly suggests that the Board is free to make an unfair estimate, especially in the light of the decision in *Universal Camera* that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. . . . Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. Professor Davis states frankly that Administrative determinations of credibility are often set aside because the reviewing court firmly believes that the evidence supporting the determination is clearly less credible than the opposing evidence, Administrative Law Treatise, § 29.06, p. 145. Professor Jaffe concedes that his general rule of deference to credibility findings is not unyielding and agrees that this may be proper: even on a credibility issue we should probably not tolerate the intuitive 'hunch' where the record evidence overwhelmingly points to the contrary. 69 Harv.L.Rev., at 1032."

It is to be noted that the Board in the instant cause, in its decision and order affirming the rulings, findings and conclusions of the Administrative Law Judge (see Appendix "E", infra, p. 37a), has misstated and improperly shifted the burden of proof as it relates to the credibility findings of the Administrative Law Judge in holding that "it is the established policy of the Board not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all the relevant evidence convinces us that the resolutions are incorrect." What the Board should be saying under the preponderance of the evidence and substantial evidence tests is that the Administrative Law Judge's resolutions with respect to credibility must be supported by the clear preponderance of all the relevant evidence in order to be

sustained. Instead, the Board is shifting the burden of proof by saying that it is the respondent who has the burden of establishing by a "clear preponderance of all the relevant evidence" that the credibility resolutions of the Administrative Law Judge are incorrect.

II. The Facts Relating To The Discharge Of Edward Olson: (Case No. 13-CA-14955).

The statement of the facts of the case set forth by the Court of Appeals in its opinion admittedly "adheres to the Board's findings, which adopted those made by the Administrative Law Judge." Unfortunately, the findings of the Administrative Law Judge distort the record, and present a slanted version of the evidence adduced in this cause, and of the inferences to be drawn therefrom, that is not in accord with the record.

Although the Court of Appeals in the instant cause was moved to say (emphasis ours):

> "The discharge of Olson presents by far the closest and most difficult question in this case, *so close that it teeters on the balance*"; and
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> • • •
>
> "We recognize, as did the Board, that *Olson was negligent in the discharge of his duties*"; and
>
> • • •
>
> "*There may have been other, justifiable reasons for his discharge*", other than his union activity;

the fact is that the Court of Appeals in its opinion does not weigh, evaluate or discuss the overwhelming countervailing evidence in the record sustaining the petitioner's position, and, because of the limited scope of the reviewing function envisioned by it, gives too much deference to and uncritically accepts at face value wholly unwarranted findings, inferences and conclusions of the Administrative

Law Judge not supported by "substantial evidence on the record considered as a whole."

What follows is a summary of the relevant evidence adduced in the trial of this cause (with appropriate supporting references to the Report of Proceedings set forth in the printed Appendix, totaling some 1,326 pages, filed by the Petitioners with the Court of Appeals), and an evaluation of the respective evidence adduced by the parties in the light of the applicable criteria or tests for determining whether or not the findings of fact of the Board are or are not supported by "substantial evidence on the record considered as a whole" as mandated by this Court in the *Universal Camera* case, *supra.*

The reasons for Jays terminating Olson's employment, upon the recommendation of William Brand, the Branch Manager of the West Broadview) Branch, are clearly set forth in the Termination of Employment report dated December 1, 1975 (Respondent's Exhibit No. 7), prepared and submitted by Mr. Brand to Mr. Marttila (Executive Vice President, Marketing—Jays), and approved by Marttila on December 2, 1975, to-wit:

> "Very poor sales, lowest in West Branch. Caused by least amount of on-job sales time, 4 days only week of 11/29/75. He allowed two accounts, one Jewel and one National, to be out of stock on JAYS items for the week-end 11/29 and 11/30 due to no-sale by him 11/28/75. No arrangements made by E. Olson for delivery of product on Saturday 11/29/75. He knowingly permitted and approved out of stock for Customers and resultant loss of sales to Customer and Jays when he checked out for the week 11/28/75 disregarding opportunity available for completing his Route Sales on 11/29/75, increasing his sales commissions and satisfying Jays Customers."

The reasons given by Jays for discharging Mr. Olson are clearly supported and sustained by the evidence adduced in the hearing on this cause, and clearly indicate that Jays, in the exercise of its managerial prerogatives had bona fide and reasonable grounds for firing Olson; and that such discharge was not due in any way to any alleged union activities or sympathies upon the part of Olson.

The immediate precipitating cause for discharging Olson was his admitted failure to adequately service and make delivery of Jays products to two major chain store accounts (one a Jewel store at 550 N. Mannheim Road, and the other a National store at 942 York Road) for the post-Thanksgiving holiday weekend of 11/28/75 through 11/30/75; so that both of said stores were either out of or inadequately stocked with Jays products for that week-end. An additional major contributing cause and reason for Olson's discharge was his continued poor sales record (consistently among the lowest in the West Branch), caused by the minimal and least amount of on-job sales time which he gave to his job as a driver route salesman of Jays and his lackadaisical attitude and minimum-of-effort approach in promoting the sale of Jays products (App. 734-740, 619, 624-627).

The evidence is undisputed that Olson on Friday, November 28, 1975, the day after Thanksgiving, failed to deliver Jays products to and failed to service two of the chain store stops that were normally serviced on Fridays, namely the Jewel store at 550 N. Mannheim Road, Hillside, and the Natiional Tea store at 942 York Road in Elmhurst. The Jewel store, which was Olson's largest dollar sales volume store in terms of buying Jays products (App. 589-590), was normally serviced on Monday, Wednesday, and Friday (App. 594). The Na-

tional store was normally serviced on Tuesdays and Fridays (App. 594). Because the chain stores normally did a large volume of business on weekends, many being open not only on Saturdays but on Sundays as well, a greater dollar volume of Jays' products were sold to the chains on Friday than on any other single day in the week (App. 595-596). On Fridays, the chain stores would permit the driver salesman not only to put or replenish merchandise on the store display shelves, but in addition would allow the driver salesman to leave extra merchandise in stock in the stockroom so that the store would have merchandise for over the weekend business. Servicing these chain stores on a Friday after a holiday, and before the weekend, and if necessary on Saturday, was therefore of particular importance to insure that the store was adequately stocked with Jays products for the weekend (App. 594-596).

Prior to November, 1975, the Company (Jays) policy relative to the driver salesmen working on Saturdays, when a holiday occurred during the week, was that the driver salesmen had to work on Saturdays, and check the chain stores to see if they were adequately stocked irregardless of whether the particular salesman had completed his route by Friday (App. 545). Several weeks prior to Thanksgiving, 1975, the policy was changed so that if a route salesman could cover all the accounts on his route in 4 days during a holiday week, and service his accounts with adequate merchandise, the route or driver salesman did not have to come down on Saturday (App. 546). Olson clearly understood and knew this to be the policy of the Company when he failed to deliver Jays products to and failed to service the two chain stores in question on Friday, November 28, 1975, and on Saturday, November 29, 1975 (App. 683).

The record discloses that seven (7) out of the twenty four (24) drivers salesmen in the West Branch worked on that particular Saturday, November 29, 1975, selling and servicing their Jays accounts on their particular routes (App. 709-710). Other than Olson (who did not work that Saturday), and the seven (7) driver salesmen who did work that Saturday, all the other driver salesmen in the West Branch who did not work that Saturday had completed the servicing of their respective accounts (App. 710).

Olson's explanation for not servicing the Jewel store (*i.e.*, delivering and selling Jays products to said store) was that he arrived late at the store (at 2:10 P.M.), after the close of receiving hours (which was at 2:00 P.M.). Olson, who testified that he doesn't wear a watch (App. 647), stated that he went into the store through the receiving doors; that Gina, the receiving girl, told him that it was after 2:00 P.M., and that she was going home; and that he had better see Gene Miller (the grocery manager) before bringing anything in; that he then went upstairs to the store office and talked to Mr. Miller, and that the following occurred:

> "Mr. Hauk (the store resident manager) and Mr. Miller were engaged in a conversation, and I said, 'Excuse me, Gene, Gina said I should see you before I brought anything in', and he said, 'Well, it's 10 after 2. The receiving hours are until 2 o'clock.' I said, 'Yes, but I have been pretty busy, Gene.' He said, 'I'm sorry, but 2 o'clock, that is it.' So I said, 'In other words, you don't want anything?' He said, 'That's right.' I replies, 'Okay, Gene.' And I left." (App. 548).

Donald Skafgaard's (The Assistant Branch Manager of the Respondent's West Branch) testimony was that when he talked to the grocery manager (Gene) the next

morning (Saturday) and asked him how come he (Gene) was out of Jays products, that the grocery manager had told him that the driver, Ed Olson, had arrived at 2:20 P.M. on Friday (App. 840).

The record is clear that no attempt was made by Olson to look at or inspect the store's display shelves, or the stockroom in the rear, to see what amount, if any, of Jays products were on hand; which, if he had done so, would have disclosed to him that the store was virtually out of Jays products. Nor was there any attempt by Olson to dissuade the Grocery Manager to permit him to make delivery despite his (Olson's) late arrival (App. 644-648). Worst still, there was no attempt by Olson to come back on Saturday to check out whether the store was adequately stocked with Jays products, or to bring in merchandise, even though he (Olson) admittedly knew that deliveries could be made to the Jewel store on Saturday (App. 648), and even though Brand (The West Side Branch Manager of Respondent) had told him on Friday afternoon, when Olson checked into the branch, to *"take care of it"* when apprised by Olson that he (Olson) had arrived too late at the Jewel store that Friday to sell and deliver Jays products to that store that day (App. 734, 794). Olson's only explanation for not going back to and servicing the Jewel store on Saturday, when Brand questioned him on Monday morning (December 1, 1975) as to why he (Olson) had not serviced the Jewel store, was: "Well, Bill, I checked in—I didn't think of it and you didn't say a word to me either." (App. 551).

Donald Skafgaard (The Assistant Branch Manager of the West Branch of Jays) when he checked the Jewel store on Saturday morning (November 29, 1975) found that the store was basically out of JAYS products (*i.e.*,

of the 55¢ chips, the 79¢ boxes, the 79¢ dips, the big J boxes), with only a few allied items left on the shelf (App. 839-840). Skafgaard at that time asked the grocery manager of the Jewel store whether he (Skafgaard) could bring Jays products in, and was told that he could, except that Skafgaard was unable to do so since he had no product with him and the grocery manager would not wait for him to come back with a route van with said products. On Monday morning, when Skafgaard had Jays products brought into the Jewel store, and apologized to the resident manager for the store not being serviced on Saturday, the resident manager told Skafgaard that if Olson had approached him (the resident manager) on Saturday (November 29, 1975) that he (the resident manager) had a display spot in the front of the store for a forty (40) dozen display of Jays 79¢ boxes of potato chips; but since Mr. Olson did not approach him, he (the resident manager) had filled in that display spot with something else other than potato chips (App. 840, 846-847). Olson's failure to service said Jewel store on that Friday or Saturday therefore resulted not only in the loss of sales that normally could and would have been made to that store for the weekend business, but in addition cost the Respondent a loss of a special display in front of the store in connection with which the Respondent could have sold an additiional forty (40) dozen display of 79¢ boxes of potato chips.

Skafgaard also testified that on Saturday morning (November 29, 1975) he also checked out the National store at 942 York to determine why Olson had not made any sales to that store on Friday, and that he found that store to be out of Jays products (App. 840-841); that he talked to the grocery manager of that store who said that he (the grocery manager) couldn't believe that the

Jays driver salesman had not stopped in that day (Saturday), and that both the grocery manager and the receiving check-in girl told him that Olson had not been in on Saturday or on Friday—that nobody had seen him (App. 841).

Skafgaard then proceeded to stock the National store with Jays products with three (3) dozen boxes of chips, including one and one-half dozen on the shelves, and one and one-half dozen in the stock room (App. 841, 858). Although Olson claimed to have looked into the National store on Friday (November 28, 1975), he admitted that he was in a hurry, that he didn't talk to anyone about leaving additional Jays products, and in fact left no additional merchandise with that store even though there was room on the shelf for a dozen boxes (App. 649-651).

It is to be noted that the recommendation to discharge Olson originated with and came from William Brand, the West Side Branch Manager of the Respondent (App. 742 and Respondent's Exhibit No. 7). Nowhere in the record is there any indication or intimation that Olson was discharged because of his alleged union activities or sympathies.

Olson's lackadaisical attitude and minimum of effort approach to promoting the sale of Jays products was evidenced by (1) his consistent pattern of pulling in to the garage at the earliest possible pull-in time (App. 740); (2) the minimal amount of new accounts that he procured or solicited (App. 735); (3) his practice of stopping at his home or eating lunch at his home about three times a week during a normal five (5) day work week (App. 606), and his taking a short nap at home on occasion and looking in on his pigeons (App. 610-615) (he maintained two pigeon lofts at the back end of his

yard) (App. 612); (4) his continued low standing in terms of sales, generally ranking 24th, or last, among the 24 driver salesmen operating out of the West Branch (App. 734-735); and (5) his failure, in violation of Company policy, to come in on Saturday, November 29, 1975, to service and provide merchandise to the Jewel and National stores, as previously detailed.

The Administraitve Law Judge found that Olson was discharged by Jays because of his union activities and sympathies. It is respectfully submitted by the respondent, Jays, that there is no clear, convincing and credible evidence, direct or circumstantial, let alone "substantial evidence on the record considered as a whole" to support this finding and conclusion. A careful reading of the record makes clear that the Administrative Law Judge's findings are predicated on nothing more than a number of wholly unwarranted inferences, discussed below, that have no credible factual basis in the record.

First of all, there is no evidence in the record, direct or indirect, to indicate that the Respondent (Jays) had any knowledge whatsoever of Olson's activities either in contacting the union or in procuring the signatures of other driver salesmen on union authorization cards. (App. 987-988).

Secondly, the fact that Olson was the union observer at the West Branch in connection with the N.L.R.B. election held on October 2, 1975 would not warrant or justify the Court in drawing any inference that Olson was discharged because of his alleged union activities or sympathies; particularly where, as here, (a) the record indicates that none of the other union observers at the other three (3) branches were discharged; (b) that none of the union observers at a prior election involving the driver

salesmen in 1973 were discharged; (c) that Almasi, the driver salesman who replaced Olson on Route C13, was one of those who signed a union authorization card for Olson; (d) that none of the 18 driver salesmen from the West Side Branch, who signed union authorization cards for Olson, were discharged; and (e) that neither William Judges (the driver salesman of Route CO-2) or Ray Almasi (who substituted on Route CO-9 for Judges on November 28, 1975), both of whom had signed union authorization cards, were discharged (App. 582-584, 745-747, 849-850, 987-989).

That Olson was not "singled out" by Brand on Saturday morning, November 29, 1975, when he (Brand) and Skafgaard personally checked out seven (7) stores, for which no sales were shown on the Friday "route hard cards" for November 28, 1975, is clear from the record. Respondent's Exhibit No. 6, prepared by Brand on Saturday morning, November 29, 1975, in the usual and regular course of his duties from a review of the route hard cards in the West Branch, shows that three (3) other driver salesmen (viz. Alfred Edge, driver salesman of Route CO-2; Ray Almasi, substituting for William Judges, driver salesman of Route CO-9; William Henner, driver salesman of Route C-23), in addition to Olson, were checked out on that Saturday morning to determine why no sales had been made to certain stores on their routes on Friday, November 28, 1975. Of the five (5) stores listed for these other driver salesmen, all were found, on personal inspection by either Brand or Skafgaard, to have an adequate stock of Jays products on hand. Only the two stores that Olson was responsible for servicing, namely the Jewel store at 550 N. Mannheim Road and the National store at 942 S. York Road, were, as previously noted, found to be inadequately serviced and

stocked (App. 685-689, 697-720, 838-847, 866-869). See also General Counsel's Exhibit No. 19.

The Administrative Law Judge, in an apparent effort to rebut respondent Jays' contention that Olson was not "singled out" by Brand on Saturday morning, November 29, 1975, when he (Brand) and Skafgaard personally checked out seven (7) stores, for which no sales were shown on the Friday "route hard cards" for November 28, 1975, makes an issue of the fact that the driver (Henner) at one of the stores (a Kohl store) checked out by Skafgaard on Saturday morning was not criticized or disciplined for not coming in on Saturday morning to service that store (App. 64).

The fact is, as the record makes clear, that Skafgaard when he visited the Kohl store on Saturday morning found that the store shelves were adequately stocked with Jays products, and that Skafgaard, as long as he was already there and since this was a new store with no history as yet as to how much Jays products would be required on weekends, suggested to the store manager that the stock taken from the stockroom and put on the store shelves be replenished; which Skafgaard proceeded to do. On cross-examination, Mr. Brand, the branch manager of Jays, testified that he had gone over the matter with Skafgaard and the driver (Henner), and that he (Brand) was satisfied that the servicing of said store had not been improper or inadequate (App. 817-818). Mr. Skafgaard testified that when he examined the stock on hand at the Kohl store that Saturday morning that there were enough Jays products on hand (on the store shelves and in the stockroom) in his judgmgent to last over the weekend, but to make sure that the store "wouldn't run out of any of our good selling items", that he suggested adding some of these items to the stockroom (App. 841-842). The testimony of Brand and Skafgaard in this regard is totally unrebutted.

The Administrative Law Judge's finding that he found the aforesaid explanation of Brand and Skafgaard "less than persuasive", and that he "would have expected that the other salesman (Henner) would have at least been criticized" (App. 64, note 32) since Skafgaard delivered additional stock to the store on Saturday, is a glaring example of a wholly unwarranted and obviously prejudicial inference read into the record by the Administrative Law Judge, having no factual foundation whatsoever in the record.

It is to be noted that the fact that Olson was late in getting to the Jewel store in question on Friday, and was therefore unable to service said store on that date, is not the gravamen of Olson's conduct that precipitated his discharge. The gravamen was the fact that Olson, in clear violation of Company policy, did not come in on Saturday, the next day, to service the Jewel and National stores that he had failed to take care of on Friday. This in face of the fact that some seven (7) other driver-salesmen of the West Branch had come in that Saturday to complete servicing their routes because of the intervening Thanksgiving Holiday the preceding Thursday. Added to Olson's demonstrated lackadaisical attitude and minimum of effort approach to promoting the sale of Jays products, the Branch Manager (Brand) who had repeatedly remonstrated with Olson concerning Olson's poor sales record, recommended Olson's discharge. All this, it should be noted, took place approximately two (2) months *after* the Union election of October 2, 1975. In the two month interval between that election and the incident which precipitated Olson's discharge, there is no credible evidence to indicate that the Petitioner was in anyway trying to "set-up" Olson as an excuse or pretext to fire him.

The finding of the Administrative Law Judge that Jays' executive vice president, Silas Martilla, ordered the newly appointed West Branch Assistant Manager, Donald Skafgaard, to follow Olson on his route because Olson was pro-union, a wholly unwarranted finding uncritically accepted by the Court of Appeals in its opinion, is predicated on wholly uncorroborated hearsay testimony of the rankest sort in no way supported by "substantial evidence." This finding is predicated on Lull's wholly uncorroborated testimony (denied by Skafgaard) in relation to an alleged conversation that he allegedly had with Skafgaard at a New Year's Eve party held at Dennis Altgeber's home on December 31, 1975, relating to Olson. Lull on cross-examination (App. 367) testified that Skafgaard told him that "He (Skafgaard) had followed him (Olson) home *and caught him at home at 11:00 A.M. in the morning.*" (Emphasis ours)

It is to be noted that *there is no claim or testimony whatsoever by Olson* that he had ever been followed or kept under surveillance by Skafgaard or anybody else from management, or that Skafgaard had caught him (Olson) at home at 11:00 A.M. in the morning. Skafgaard, who had come over to the West Side Branch from another branch only a few weeks before, specifically denied engaging in any surveillance of Olson (App. 847-848). Certainly common sense dictates that if Skafgaard had caught Olson at home at 11:00 A.M. in the morning, that Skafgaard would have testified to that effect in support of Petitioner's position that Olson was discharged for good cause. There is no such testimony by Skafgaard. The credibility of Lull's uncorroborated hearsay testimony in this regard is also open to question in view of the fact

that *it was Lull, and not Skafgaard,* who in connection with this alleged conversation, allegedly volunteered the information that "Olson was pro-union." (App. 364)

It should be evident to this Court that this rankest sort of uncorroborated hearsay testimony by Lull, clearly controverted on the record, cannot reasonably be deemed to be of sufficient probative and corroborative value to warrant drawing any inference that Olson was discharged for his alleged union sympathies and activities.

Another glaring example of a wholly unwarranted and prejudicial inference read into the record by the Administrative Law Judge is his reliance on the wholly uncorroborated and controverted testimony of Olson (denied by Mr. Japp) that after the election, held on October 2, 1975, Leonard Japp, Sr., the president of the company, allegedly approached Olson and extended his hand in a handshake, and allegedly said in what the Administrative Law Judge characterized as "an unfriendly insincere tone": "Thanks a lot, Ed." For the Administrative Law Judge to attempt to draw any unlawful inference (of an intent to discharge Olson because of his alleged union sympathies or activities) from this type of incredulous testimony is patently ridiculous. It is to be noted that this alleged incident allegedly took place on October 2, 1975, while Olson was not discharged until two months later on December 1, 1975 (App. 1158, 543).

Nor is the pamphlet entitled "Let's Talk Dollars And Sense" (General Counsel's Exhibit No. 16), put out by the Respondent in connection with the union election held on October 2, 1975 (which election the union lost, and to the conduct of which election the Union filed no objection), a basis for drawing any inference that Olson was discharged because of his alleged union activities or sym-

pathies. The fact that the Respondent honestly felt that the driver salesmen would be better off without a union, a point of view sanctioned by the First Amendment (and agreed to by a majority of the driver salesmen at the election) is no necessary indication of anti-union animus upon the part of the Respondent; and even if it were to be construed as reflecting the employer's antipathy or hostility to a union, the same does not supply an unlawful motive as to Olson's specific discharge for purposes of showing an unfair labor practice.

The Administrative Law Judge has also chosen to draw an inference, that the Petitioner discharged Olson because of his alleged union sympathies or activities, from the facts that Olson had worked for Jays for over 20 years, and the fact that Petitioner elected to discharge Olson rather than suspend him or warn him against any future infractions against company rules.

The record clearly indicates not only that the Respondent was and had been dissatisfied with Olson's poor sales record, caused by the minimal and least amount of on-job sale time which he gave to his job as a driver salesman, and his lackadaisical attitude and minimum-of-effort approach in promoting the sale of Jays products, but in addition indicates that Bill Brand was constantly needling and reminding Olson that he (Olson), an experienced long time employee, ranked among the lowest in terms of dollars volume sales of all the driver salesmen in the West Branch, and that he (Olson) could do better, and that Olson's only rejoinder was that he (Olson) was doing the best he could. (App. 738). Respondent's dissatisfaction with Olson's work performance was therefore known to Olson. Olson's failure to properly service the two chain store accounts, particularly his unexplained failure to come in on Saturday to complete servicing said accounts

(in violation of the Company's policy and rule that the accounts must have been properly serviced before a driver salesman could take off on Saturday, particularly after a Holiday) was an unforgivable sin in the eyes of the Respondent, with its stress on servicing its large chain store accounts, and was the straw that broke the camel's back so to speak, given the Respondent's dissatisfaction with Olson's overall work performance.

Whether the inference drawn by the Administrative Law Judge is a reasonable one, and whether a reasonable countervailing inference deserving of equal weight can be drawn that Olson's discharge was not unlawfully motivated, but was instead due to Olson's unexplained failure to come in on Saturday to service the two chain stores in question (knowing as he did that he had not serviced the Jewel store on the preceding day, Friday, because he had arrived at the store late), and Petitioner's dissatisfaction with Olson's poor sales record and his lackadaisical attitude and minimum-of-effort approach to promoting the sale of Jays products, is one that must be gauged on the "substantiality" of the record as a whole in supporting one or the other inference. Misguided sympathy for Olson, in spite of his admitted inadequacies of his job performance, because he had lost his job is not the test. He was not left bereft, since his vested rights of some 15 or 16 years of participation in the Petitioner's Profit Sharing and Pension Plans still accrued to him upon severance of his employment. Absent meaningful other or corroborative "substantial evidence" on the record as a whole, of which there is none in the instant cause, that Olson was discharged by the Petitioner because of his union activities or sympathies, no inference of any unlawful motive upon the part of the Jays can properly be drawn by the Labor Board by reason of Petitioner's decision to terminate

Olson's employment, rather than suspend or otherwise discipline him. See *N.L.R.B.* v. *Garner Tool and Die Manufacturing, Inc.*, 493 F.2d 263, 267-268 (C.A. 8, 1974); *N.L.R.B.* v. *United Parcel Service, Inc.*, 317 F.2d 912, 914 (C.A. 1st, 1963); and *N.L.R.B.* v. *Billen Shoe Co.*, 297 F.2d 801, 803 (C.A. 1st, 1968)

The case of *N.L.R.B.* v. *Tom Wood Pontiac, Inc.*, 447 F.2d 383, 386 (C.A. 7, 1971), cited by the Court of Appeals in its opinion, can clearly be distinguished on the facts from the Olson case, and furnishes no real basis for comparison to the Olson case.

In the *Tom Wood Pontiac* case, supra, the aggrieved employee, one day after the Union's election victory, was formally reprimanded for low productivity, tardiness, and participation in "group bull sessions during working hours." Two weeks later he was reprimanded by the shop foreman for being nine minutes late. Two weeks after that he was discharged, allegedly on the basis of his work as a bumper man being eliminated, even though the company thereafter continued doing bumper work. The evidence also indicated that the Company knew that the employee was a "main man" in the Union, and that the Company had interrogated him prior to the election. Clearly under the circumstances of that case, the Board could and did find that there was substantial evidence on the record as a whole to conclude that the reprimand and his discharge on the basis of his job being eliminated were pretexts to hide the motive for firing the employee because of his union activities.

In the Olson case, there is no evidence of any interrogation of Olson by the Petitioner. His discharge took place two months after the Union election, and for reasons that were supported by substantial evidence, viz. his failure to properly service two of his chain store accounts, added to

his past history of poor sales performance; rather than a contrived situation or pretext set up by the Company as in the *Tom Wood Pontiac case,* supra. There is no real comparison between the two cases.

The uncritical acceptance by the Court of Appeals of the unwarranted findings, inferences and conclusions of the Administrative Law Judge does a grave injustice to the Petitioner, and negates the function of judicial review by Courts of Appeal contemplated and mandated by the *Universal Camera Corp. case,* supra.

Given the state of the record here, the expressed misgivings of the Court of Appeals that the *Olson* case is so close "that it teeters on the balance", and the findings of the Court of Appeals that Olson was negligent in the discharge of his duties, and that justifiable reasons existed for his discharge, it is apparent that the Court of Appeals in the instant case has misapprehended, misapplied and too modestly and narrowly construed the permissible scope of its review and reviewing function as laid down by this Honorable Court in the *Universal Camera* case, *supra;* and that because of the limited scope of the reviewing function envisioned by it, the Court of Appeals has given too much deference to and has uncritically accepted at face value findings, inferences and conclusions of the Administrative Law Judge clearly not supported by "substantial evidence on the record considered as a whole."

III. The Facts Relating To Jays' Termination Of Its Cartage Operations, And The Contracting Out Theretof To Nielsen Brothers Cartage Co., Inc. (Case No. 13-CA-14889 Of The Consolidated Proceedings Below)

On November 14, 1975, the respondent, Jays, a manufacturer of snack food products, particularly potato chips

terminated its cartage operations, discharged all (26) of its tractor-trailer drivers, and effective November 17, 1975 sold its tractor-trailer equipment and supplies to the respondent, Nielsen Brothers Cartage Co., Inc., a trucking company engaged in the cartage business (hereinafter sometimes referred to as "Nielsen", and "contracted out" all its cartage requirements to Nielsen pursuant to a contractual agreement entered into between Jays and Nielsen. Fifteen (15) of these tractor-trailer drivers so discharged were hired by Nielsen on November 15, 1975, and an additional eight (8) of these tractor-trailer drivers discharged by Jays were hired by Nielsen on January 12, 1976. Nielsen is, and has for many years, been unionized, and its tractor-trailer drivers are represented by the Chicago Truck Drivers, Helpers, and Warehouse Workers Union (Independent) as the collective bargaining agent of its tractor-trailer drivers.

Jays contends that it discontinued its cartage operations and contracted same out to Nielsen for valid business and economic reasons wholly unrelated to any alleged union activities upon the part of its tractor-trailer drivers, and denies that it committed any unfair labor practices in connection therewith.

The Administrative Law Judge found that Jays subcontracted its cartage operations out to Nielsen and discharged its tractor-trailer drivers because of alleged union activities upon the part of said tractor-trailer drivers, and in connection therewith committed certain unfair labor practices.

As a remedy, the Administrative Law Judge recommended an Order (1) that Jays reimburse its discharged tractor-trailer drivers for any loss of pay and benefits resulting from said discharges, and (2) in the event that

Jays resumed its cartage operations contracted out to Nielsen, that it offer to reinstate said tractor-trailer drivers to their former jobs.

The Board, by its Order of February 24, 1977, adopted the rulings, findings and conclusions of the Administrative Law Judge, except that the Board held that Jays should be required to resume and re-establish its former cartage operations.

The Court of Appeals held:

> "We find this a close and difficult case in which there is a great deal of conflicting evidence on many of the crucial questions. If we were deciding the case *de novo,* we might very well have made findings and conclusions contrary to some of the Board's determinations. However, we adhere to the limited scope of our review, and after reviewing the 1326-page record, we have concluded that the Board's findings regarding Jays' violations of the Act are supported by substantial evidence. Nevertheless, we find that the remedy provided by the Board is one case, 13CA-13889, is contrary to the recommended decision of the Administrative Law Judge and is not warranted by the record before us. Therefore, we hold the Board's order in this aspect to be an abuse of discretion and modify it to conform to the recommendations made by the Administrative Law Judge."

The statement of facts relating to this phase of the case, as set forth by the Court of Appeals in its opinion, also admittedly "adheres to the Board's findings, which adopted those made by the Administrative Law Judge". Unfortunately, the findings of the Administrative Law Judge distort the record, and present a slanted version of the evidence adduced in this cause, and of the inferences to be drawn therefrom, that is not in accord with the record.

What follows is a summary of the relevant evidence adduced in the trial of this cause relating to Jays terminating its cartage operations, and contracting same out to Nielsen, and an evaluation of the respective evidence adduced by the parties in the light of the applicable criteria or tests for determining whether or not the findings of fact of the Board are or are not supported by "substantial evidence on the record considered as a whole" as mandated by this Court in the *Universal Camera* case, *supra.*

Nielsen is a family owned trucking or cartage firm that has been engaged in the trucking business as a common carrier and contract carrier (pursuant to authority granted by the Interstate Commerce Commission). Jays is engaged in the business of manufacturing and selling of food snacks, primarily potato chips. It has not been engaged in the trucking or cartage business for hire, and has no authority from the Interstate Commerce Commission to do so. Prior to November 15, 1975, Jays handled its own cartage of its products (*i.e.,* the delivery of its own products in its own trucks from the factory to the branch distribution points) as an adjunct to carrying on its business of manufacturing and selling snack foods. (App. 189-193, 875-877, 1069; see also Respondent's Exhibit No. 10).

The record shows that for some years Nielsen had solicited Jays cartage business, attempting to convince Jays that due to Nielsen's expertise and experience as a professional trucking and cartage firm, it could perform the cartage work for Jays in a more economical and efficient manner than Jays could perform this work for itself (App. 887, 1071, 1122).

For the period covering May 21, 1975 and continuing through November 14, 1975, the parties, through their respective officers, engaged in negotiations which culminated

in the sale by Jays to Nielsen of all of Jays' tractors and trailers, and trucking supplies, and the entry into a transportation contract between Jays and Nielsen under which Nielsen undertook and agreed to handle on a contract basis all of Jays cartage hauling. These negotiations encompassed various meetings, telephone conversations, memorandums, inspections, etc. (App. 886-923, 941-966, 1071-1094, 1041-1060, 1159-1165).

The economic and business reasons that moved Jays to terminate its own private cartage operation, and to contract same out to Nielsen, are most succinctly set forth by Mr. Martilla in the supporting affidavit of Mr. Martilla (dated October 17, 1975), Respondent's Exhibit No. 10, filed with the Interstate Commerce Commission in support of Nielsen's application to the ICC for contract carrier authority to haul Jays' products. In that affidavit (see page 4 thereof), Mr. Martilla points out that Jays' private cartage operation "*has become so large, unwieldy and uneconomic that we just cannot continue conducting a private carrier operation.*" (Emphasis ours)

A memorandum (Respondent's Exhibit No. 11) prepared by Nielsen in late August or early September, 1975, and submitted to the Jays management at that time in connection with the then ongoing discussions and negotiations had between Jays and Nielsen, indicated that for the week of July 27th to August 2, 1975 (a week selected at random by Nielsen, after inspecting the driver's log books at Jays, as reflecting a typical weekly cartage operation at Jays) that Nielsen could have performed the cartage work of Jays for that week on a contract basis at a cost to Jays of $21,232.01. That compared to Jays actual cost of $23,203.32 (Respondent's Exhibit No. 12) for performing said cartage work itself for that week; a differential of $1,971.31 for that week which Jays could have saved had

Nielsen handled Jays' cartage work for that week at Nielsen's proposed contract rate, compared to Jays' cartage operational costs for that week. From this, Jays' management (Mr. Martilla) foresaw a potential savings of $100,000.00, or more, per year in its cartage operational costs if its cartage operation was "farmed out" or "contracted out" to Nielsen on a contract basis (App. 955). It was this potential savings that solidified the interest of Jays' management in Nielsen's proposition and proposal. (App. 892-905, 1044)

Thereafter, at Mr. Martilla's suggestion, as a further check on the potential of any such savings in cartage operational costs, Mr. Stanislawski, (the Treasurer of Jays) prepared an analysis of Jays' cartage operational costs for the first 35 weeks of 1975 (through 8/30/75, that being the only cost data to-date available at that time). Said analysis is reflected in Respondent's Exhibit No. 13, which indicated that the average weekly cartage operational costs of Jays for the first 35 weeks of 1975 wsa $22,552.00 per week; a differential of $1,320.00 per week compared to the $21,232.01 average weekly projected lower figure at which Nielsen indicated it could handle Jays' cartage work on a contract basis. From this Jays' management concluded that even if the projected savings were to amount to only $1,300.00 per week, that the annual savings in cartage operational costs, if the work was contracted out to Nielsen, could amount to anywhere around $65,000 to $75,000 per year. (App. 907-909).

An additional economic consideration which was highly persuasive to Jays' management in deciding to abandon its own cartage operation, and to contract the same out to Nielsen, was the fact that under such contract arrangement with Nielsen, Nielsen would purchase the tractor and trailers, and automotive supplies theretofore used by Jays

as part of its own cartage operation, thus enabling Jays to recoup, and make available for cash flow purposes its substantial capital investment in automobile equipment and supplies (App. 897, 905, 919, 1047).

In addition, it was felt that such an arrangement would eliminate the need for further sub.antial capital investments by Jays in replacement trucking equipment (particularly diesel tractors) that would be needed from time to time to replace obsolescent and worn out trucking equipment (App. 897, 1047, 955).

Further, from a personnel point of view, Mr. Marttila believed that by making the change over, that Jays' shipping supervisor, and those working in that department, would be able to do a better job in just concentrating on getting the trailer loaded, and that he (Marttila) would be personally relieved of spending time on running the cartage operation, and could more effectively concentrate on his prime responsibility of marketing and selling Jays' products (App. 956).

The record is undisputed that since November 14, 1975, when Jays terminated the employment of all its tractor-trailer drivers, and contracted out its cartage work to Nielsen, that no replacement tractor-trailer drivers have been employed or hired by Jays. It is also undisputed that since that time Jays had not purchased or otherwise acquired any replacement tractors or trailers to replace the automotive equipment that it sold to Nielsen; that Jays has not engaged on its own in the cartage of its own products from the factory to its branch distribution points; and that Nielsen has continued to handle Jays' cartage needs on a contractual basis. (App. 969)

The record shows that since November 17, 1975, Jays cartage requirements (*i.e.*, the delivery of its products

from the factory to the various branch distribution points) have been handled by Nielsen pursuant to contractual cartage agreement between Jays and Nielsen, and that as part of said transaction the tractor and trailer equipment theretofore used by Jays for its cartage operation was sold, and title to said equipment transferred to Nielsen. Nielsen paid Jays (i) the sum of $62,632.00 for the tractors purchased by it from Jays (Respondent's Exhibit No. 21), and (ii) the sum of $22,569.06 for automotive parts purchased by it from Jays (Respondent's Exhibit No. 22). In addition, Nielsen purchased Jays' 35 trailer units for the sum of $76,448.00 payable in monthly installments of $1,830.66 over a four year period, with the first installment due and payable on December 17, 1975. Nielsen's obligation therefore is evidenced by a Bill of Sale and an Installment Note dated November 17, 1975 (Respondent's Exhibt No. 23). The record shows that as of the date of the hearing in this cause that these monthly installments had been and were being currently paid by Nielsen to Jays. See also Respondent's Exhibit No. 26). The total capital investment thereby recouped and to be recouped by Jays under this arrangement amounted to $161,639.06 (Respondent's Exhibit No. 19. See also App. 981-987, 1055-1056).

Further the record shows that Nielsen purchased from General Motors Corporation, on or about January 17, 1976, three (3) diesel tractors for use in handling the cartage business, and paid therefore the sum of $55,950.00 (Respondent's Exhibit No. 27; App. 1111). This is a capital expenditure that Jays would have had, had it continued to handle its own cartage operation. In addition Nielsen purchased from Willett Leasing Company two (2) tractors that Jays had previously been leasing from Willett Leasing Company (App. 1108-1110).

The record further shows that Jays management's anticipated savings in cartage operating expenses as a result of farming out or contracting out its cartage operations to Nielsen have in fact been and apparently are in the process of being substantially achieved. Thus a comparative study made by Mr. Stanislawski (the Treasurer of Jays) of Jays' actual cartage operating expenses with Nielsen for the first 13 weeks of the first quarter of 1976 (those being the latest figures then available), compared to what it would have cost Jays to operate its own cartage needs for the same period of time, indicates a potential savings in cartage operating costs to Jays ranging from $1,526.00 per week ($23,320 minus $21,794) to $1,083 per week ($22,877 minus $21,794), depending on whether the hourly wage rate of the tractor-trailer drivers would have been $6.83 per hour (as contemplated by the unexecuted collective bargaining agreement with the Chicago Truck Drivers Union), or the then prevailing wage scale of that union of $7.28 per hour. (See Respondent's Exhibit No. 20; App. 978-981, 1056-1060). This is apart from the fact that Nielsen's cartage charges to Jays include a substantial increase in cartage operation volume handled by Nielsen that would have required further expenditures and costs by Jays to handle this increase in cartage volume (App. 994-999).

It is clear from the record that Jays' on-going negotiations with Nielsen, commencing on May 21, 1975 (App. 886-889, 1071-1072), *antedated in its inception and progression any overt union activities by any of the tractor-trailer drivers. There is no indication of any overt union activities by any of said drivers until mid-September, 1975,* when McCormick, one of the drivers, advised Lull, another one of the drivers, that he (McCormick) had contacted Teamsters Local No. 705 and had set up a meeting at the union hall for September 26th; a meeting which was attended by six of the drivers, and at which it was agreed to call a general meeting of the drivers with the Union on Saturday morning, October 4th at a motel in Calumet City. (App. 295-303, 258-261).

The record shows that the union officials from Teamsters Local No. 705 were well aware of the problems that the Chicago Truck Drivers Union had previously had with the Jays' tractor-trailer drivers, in having a contract negotiated by the union repudiated by the Jays' drivers (App. 309, 470), and that none of the officials from Teamsters Local No. 705 showed up at that meeting (App. 316-318, 473). Thereafter there were no overt union activities or meetings involving the tractor-trailer drivers (except for a conversation had between Siebert and Lull, two of the drivers, and Fred Boudreau and Pete Andronus of the Chicago Truck Drivers' Union in the middle of October, 1975, when Lull asked these union officials to "nosy" around a little to find out whether Jays was going to dispose of its cartage operations) (App. 320-324.)

The record is clear that before any overt union activities outlined above occurred, that negotiations between Jays and Nielsen had progressed to a point where (i) *Nielsen, on or about Sept. 2nd or 3rd had personally checked out Jays' cartage operations, and had inspected the log books of the Jays' drivers.* (App. 890-891, 1073-1074); (ii) *that Nielsen, on or about Sept 8th or 9th had submitted to worksheet calculation* (Respondent's Exhibit No. 11) *to Jays reflecting what it would have cost Jays to have had Nielsen handle Jays' cartage operations for a sample week* (App. 1074-1075, 891-893), *and had met with Mr. Stanislawski, of Jays, and had worked out a formula to purchase Jays' automotive equipment if the cartage operations were contracted out to Nielsen* (App.

903-905, 1041-1044, 1075-1077). *By Oct. 9th, the proposed agreement between Jays and Nielsen was firmly crystallized and agreed to, subject to contract formalization and ICC issuance of a certificate of contract authority to Nielsen to haul Jays' products* (App. 956-963, 1084-1089).

The pamphlet entitled "Let's Talk Dollars & Sense" (Gen. Counsel's Exhibit No. 16) put out by the Respondent Jays in connection with a totally different group of employees (the driver-salesmen), in connection with an N.L.R.B. election held on October 2, 1975, and not directed to the tractor-trailer drivers at all, is of no real probative value, and cannot properly give rise to any valid presumption of an anti-union animus upon the part of Jays as it relates to the reasons that Jays contracted out its cartage operations to Nielsen. *Given the admitted fact that the Respondent Jays had in good faith, after losing an N.L.R.B. election in October, 1973 involving these same tractor-trailer drivers, negotiated out a collective bargaining agreement with the Chicago Truck Drivers Union* (independent), which the men had rejected against the recommendation of their own certified collective bargaining agent (and which caused the union to voluntarily withdraw as collective bargaining agent), *there is no real basis for any inference that Respondent Jays was motivated by any anti-union animus, or by any alleged union activities of its tractor-trailer drivers* (of which there were really nothing of substance) *when it decided to contract out its cartage operations to Nielsen.* (See Respondents' Exhibit No. 15. Also see App. 926-933.)

The fact that Jays' name has continued to be shown on the trailers for advertising purposes (Nielsen's name is on the tractors) is totally irrelevant and of no probative value, and no inference of any unlawful motivation upon the part of the respondent in contracting out its cartage

operations to Nielsen can properly be drawn from said fact, as the Administrative Law Judge seems to imply. The fact is that Nielsen does the same for its other "contract" customers, including Zenith, Precision Scientific, Urban Products, etc. (App. 1135).

The fact that the tractors and trailers purchased by Nielsen from Jays continued, after said purchase, to be parked or stored on the Jays parking lot area contiguous to the Jays plant at 825 E. 99th Street, Chicago, Illinois, also is totally irrelevant and of no probative value on the issue of "successor employer"; and no inference of any unlawful motivation upon the part of the respondent in contracting out its cartage operations to Nielsen can properly be drawn from said fact, as the Administrative Law Judge seems to imply. As Mr. Nielsen pointed out, the fact is that "trailers, tractors and trucks with all our contract accounts, except for three vehicles, are housed, garaged, whatever term you want to use, at the customer's plant." (App. 1103)

The fact that former drivers for Jays, after being hired by Nielsen continued to haul Jays products in the trucks purchased by Nielsen is likewise totally irrelevant and of no probative value; and no inference of any unlawful motivation upon the part of the respondent in contracting out its cartage operations to Nielsen can properly be drawn from said fact as the Administrative Law Judge seems to imply. It would be logical for these men to be so used by Nielsen inasmuch as they were experienced in the handling of Jays' products. In addition, the terms of employment of these men at Nielsen were materially different from those that the men had had at Jays. For one thing, Nielsen's trucking operation was, and had for many years been unionized (the Chicago Truck Drivers, Helpers and Warehouse Workers Union, independent, be-

ing the collective bargaining agent of the drivers), and as a consequence those former tractor-trailer drivers of Jays who were employed by Nielsen had to join that union (See App. 173, 194-195). Secondly, the union hourly wage rate which they received on going to work for Nielsen was substantially higher than that which they had been receiving at Jays ($7.28 per hour compared to an hourly rate of $6.51 per hour at Jays). Thirdly, the union fringe benefit package which the drivers received at Nielsen was different from that which the drivers had while employed at Jays (App. 349-353) Fourthly, Nielsen installed tachographs in the tractors that it acquired from Jays to monitor the travel time and stoppage time of the drivers; something which had not been done at Jays (App. 500-501). Fifthly, when Nielsen took over the cartage operation at Jays on November 17, 1975, it put in its own dispatcher and automobile mechanic at Jays' plant to service said cartage operation (App. 1144-1147).

Nor can any inference of unlawful motivation upon the part of the respondent, Jays, be drawn, as does the Administrative Law Judge (App. 55), from the fact that the cartage contract (Respondents' Exhibit No. 18A and 18B) between Jays and Nielsen, though on a year to year basis, permits either party to cancel the same upon 30 days written notice, and permits Jays to repurchase certain equipment at certain annual periods until November 17, 1980 upon certain terms and conditions. Such a provision would be a logical concomitant to this first cartage agreement between the parties in the event that either of the parties, through experience, found that this arrangement wasn't working out in a satisfactory manner. (App. 960-961, 1053-1054, 1087).

Repeatedly, as noted above, the findings of the Administrative Judge repeatedly distort the record by reading

into it, by unwarranted inference after unwarranted inference, particularly where the evidence adduced by the Respondents is uncontroverted, his own colored interpretation of that evidence and his own value judgment of what management should or should not have done in deciding to contract out the Jays cartage operation.

A further prime example of that is the finding of the Administration Law Judge that while he had no doubt that some dollar savings would be ecected by Jays in contracting out its cartage operations to Nielsen, that he did not believe that Jays would have contracted out its cartage operation and departed from its past practice of handling and directly controlling its own cartage operations "but for the advent of the drivers' effort to bring the Teamsters into the operation." (App. 57)

Another is his finding "that the possibility of the Teamsters coming in was a substantial factor in the decision to subcontract the operation", and that "the discussions between Nielsen and Jays with respect to the former taking over Jays' delivery operations did not become serious until the late part of September, when the employees began contacting the Teamsters, leading to a tentative decision on October 1, and a firm decision on October 9 to contract out the operation" (App. 56).

Another is the finding "that although Jays claims negotiations were initiated in May with Nielsen concerning contracting out this operation, and though Jays assertedly found it necessary to cut back on expenses between May and July because of adverse market conditions, no effort was made during that period to act on Nielsen's contention that he could perform the deliveries more economically than Jays", and that "after the drivers began their union activity, the negotiations became accelerated and the decision made." (App. 57)

Equally blatant and unfair is the unwarranted finding and inference of the Administrative Law Judge:

> "From my observation of the witnesses and consideration of the facts, I am persuaded that such contracts and discussion as may have occurred before September 17 (relating to the negotiations between Jays and Nielsen) were more casual and less definite than the witnesses indicated in their testimony, and that some later events may have been transposed to a slightly earlier time." (App. 49).

These are all unwarranted inferences and subjective judgments upon the part of the Administrative Law Judge, totally unsupported by any substantial, clear and convincing evidence, and contrary to the clear import of the evidence adduced in the record.

The economic and business reasons that moved Jays to terminate its own private cartage operations, to sell its cartage equipment, and to contract its cartage operation out to Nielsen are clear and uncontroverted, and have been previously detailed. That there were legitimate, bona fide and sound business and economic reasons for Jays contracting out its cartage operations is abundantly clear from the record. This was too important a step for Jays to act precipitously on this matter, and the record makes clear that Jays' management very carefully analyzed Nielsen's proposal, and the cost and distribution implications thereof, before deciding to contract its cartage operations out to Nielsen.

That the findings of the Administrative Law Judge, and the inferences aforesaid drawn by him therefrom, are not supported by "substantial evidence on the record considered as a whole" should be evident from the uncontroverted facts recited afoersaid; from the fact that Jays, after losing an NLRB election in October, 1973 involving

these same tractor-trailer drivers, had negotiated out a collective bargaining agreement (Respondents' Exhibit No. 15, App. 1263) with the Chicago Truck Drivers Union (Independent), the then certified collective bargaining agent of said tractor-trailer drivers (thus reflecting respondent Jays' willingness to deal and negotiate with a union), which the drivers repudiated; from the fact that Jays' on-going negotiations with Nielsen, commencing on May 21, 1975, antedated in its inception and progression, as detailed aforesaid, any overt union activities by any of the tractor-trailer drivers; and from the further fact that the alleged union activities of some of the drivers in going to Teamsters Local No. 705, was at best short lived and sporadic (at most from mid-September, 1975 to October 4, 1975, with their being no overt union activities and meetings of the tractor-trailer drivers after October 4, 1975, when the Teamster representatives failed to show up at the motel for a meeting with the drivers), which would seem to indicate that the sudden union activity upon the part of some of the tractor-trailer drivers was the *result of rather than the cause of* Jays' negotiations with Nielsen, since Mr. Nielsen had personally checked out Jays' cartage operation on September 2nd or 3rd of 1975 at the Jays plant and had inspected the log books of the Jays' drivers. Why else would Lull, in the middle of October, 1975 be asking two union officials from the Chicago Truck Drivers Union to "nosey" around a little to find out whether Jays was going to dispose of its cartage operations?

Given the record noted above, what then is the so-called evidence upon which the Administrative Law Judge predicates or grounds his finding and conclusion that Jays contracted out its cartage operations to Nielsen and discharged its truck drivers because of their union activities,

and does that evidence meet the test of substantiality on the record considered as a whole mandated by the *Universal Camera* case?

This so-called evidence ("minutiae" would be a more apt term), discussed below, consists of several scattered and unrelated inquiries and or statements, devoid of any real threats or promises and some of which are disputed and controverted, made by or attributed to supervisory personnel of Jays, whose cumulative impact can in no sense be regarded as substantial evidence on the record considered as a whole on the issue as to Jays' "motivation" in contracting out its cartage operations to Nielsen. See *N.L.R.B.* v. *United Parcel Service Inc.,* 317 F.2d 912, 914 (C.A. 1st, 1963).

One part of the "minutiae" is the fact that Staton, the assistant shipping supervisor at Jays, in late September or early October, 1975, when he came back from his vacation, asked three or four of the tractor-trailer drivers whether they had contacted a union, and whether they wanted a union, and was told by those of whom he made such inquiry that they didn't know anything about a union. (App. 202-203, 219-224).

The record clearly indicates that Staton's inquiry was innocuous, completely devoid of threats or promises, completely free of coercive statements, and completely free of resort to systematic intimidation; and therefore within the free speech protection of the Act.

In *N.L.R.B.* v. *Century Broadcasting Corporation,* 419 F. 2d 771, 780 (C.A. 8th, 1970), the Court held that where employer's general manager had been informed that some employees had signed union authorization cards, manager's inquiry of employee whether he knew men were

going union did not constitute prohibited interrogation. Said the Court:

> "Isolated interrogation, free of coercive statements and absent resort to systematic intimidation, does not constitute an unfair labor practice but falls within the free speech protection of the Act. *Beaver Valley Canning Co.* v. *N.L.R.B.,* supra (332 F. 2d at 433)."

In *N.L.R.B.* v. *Twin Table & Furniture Co.,* 308 F. 2d 686 (C.A. 8, 1962), it was held that interrogation of employees about the union by representatives of the respondent's management was not a violation of the Act because the interrogation was innocuous and devoid of threats or promises.

To like effect see *Beaver Valley Canning Company* v. *N.L.R.B.,* 332 F. 2d 429, 433 (C.A. 8, 1964); *H. Kress & Co.* v. *N.L.R.B.,* 317 F. 2d 225 (C.A. 9, 1963); *N.L.R.B.* v. *Larry Faul Oldsmobile Co.,* 316 F. 2d 595 (C.A. 7, 1963); *Lincoln Bearing Co.* v. *N.L.R.B.,* 311 F. 2d 48 (C.A. 6, 1962); *Acme Products, Inc.* v. *N.L.R.B.,* 389 F. 2d 104, 107-108 (C.A. 8, 1968); *N.L.R.B.* v. *Arkansas Grain Corporation,* 392 F.2d 161, 165-166 (C.A. 8, 1968); *N.L.R.B.* v. *Prince Macaroni Manufacturing Co.,* 329 F.2d 803, 806 (C.A. 1st, 1964); *N.L.R.B.* v. *Monroe Auto Equipment Co.,* 368 F.2d 975, 979-981 (C.A. 8, 1966).

Staton, it is to be noted, testified that he made such inquiry on his own, and that nobody in management suggested or authorized him to make such inquiry.

The same is true of the opinion expressed by Staton on or about November 5, 1975 (approximately a month after Jays' management and Nielsen had arrived at an agreement for Nielsen to handle Jays' cartage operations, and approximately 10 days before Jays terminted its cartage operations), in a conversation with a Siebert

Kuiken, one of the tractor-trailer drivers that the "Old Man" (Mr. Japp, Sr.) was going to get rid of the trucking operation. (App. 203).

The Administrative Law Judge also saw fit to predicate his finding and judgment on the uncorroborated testimony of Robert Lull, one of the tractor-trailer drivers and the complainant in Cases No. 13-CA-14889 and 13-CA-14890), of an alleged conversation had by him with Staton in the washroom of a tavern, after the meeting of the trailer-tractor drivers at the plant at 5:00 P.M., on October 3, 1975. Supposedly, Mr. Staton had gone to the tavern with eight of the drivers, including Lull. Lull's testimony was as follows (App. 271):

> "John told me, he says, Bob, you know the old man is talking about selling the fleet. I said, John, I have heard this ever since I have been working here. I said I will believe it when I see it. John says, well, this time the old man is serious and that was the end of the conversation."

On a similar vein is the uncorroborated and controverted testimony of James Paluch, a tractor-trailer driver of Jays (who was not employed by Nielsen until January 12, 1976) of an alleged conversation had by him with Art Timmons, Sr., (a son-in-law of Mr. Japp, Sr.), at the North branch around the middle of October, 1975. Paluch's testimony as to the alleged conversation was as follows (App. 430):

> "And he (Timmons) says, I understand you guys are starting this union stuff again. I said, I don't want to know anything about it. I don't know anything about it. I don't want to know anything about it. . . . And he (Timmons) says, well, tell you one thing he says, you are getting the old man (Mr. Japp, Sr.) pretty mad and he's going to sell the trucks."

Timmons denied having any such conversation with Paluch. (App. 564)

Of similar questionable evidentiary quality is the finding of the Administrative Law Judge that Jays, through Leonard Japp, Sr., its president, did on or about October 3, 1975, threaten "to close the doors" of the respondent if the employees brought the Teamsters in, and illegally interrogated Ronald Davis, one of its tractor-trailer drivers of Jays not hired by Nielsen until January 12, 1975).

There is no "substantial" evidence to support this finding. There is only the uncorroborated and less than credible testimony of Davis who testified to an alleged conversation (denied by Mr. Japp, Sr.) that he had with Mr. Japp at approximately 6:15 P.M. on October 3, 1975 in the dispatcher's office at the Jays plant, at which another tractor-trailer driver, one Charles Dietz, was according to Davis, allegedly present.

On cross-examination Mr. Davis, who was a union member when hired by Jays (App. 449-451), testified that Mr. Japp, Sr. did not indicate where the meeting was going to be at, or with whom the meeting was going to be, or that the meeting was a union meeting. (App. 453-454). Mr. Davis also testified that Mr. Japp, Sr., did not, thereafter, ever ask him about the meeting, did not ask him (Davis) whether he had gone to the meeting, or say anything to him about unions, or about closing the trucking operations. (App. 460).

It is to be noted that Charles Dietz, the other tractor-trailer driver of the respondent who, according to Davis, was allegedly present at this conversation, was not called as a witness by the General Counsel. So Davis' testimony is uncorroborated.

Mr. Japp, Sr. testified that he left the office for home between *3:00 & 3:30* P.M. in the afternoon of October 3, 1975, that he was not at the meeting held with the tractor-trailer drivers at the plant later that afternoon (about 5:00 P.M.), and that he did not have any conversation either with Davis or Dietz, as claimed by Davis. (App. 1152-1154) It is to be noted that two other tractor-trailer drivers of the respondent (Jays), Robert Lull, (App. 326, 330-331) and James Paluch, (App. 443-444) do not recall seeing Mr. Japp, Sr. either at the meeting or thereafter on that date. The testimony of Messrs. Marttila and Whalen of the respondent company (Jays) was to like effect. (App. 937-938, 1179)

The credibility of Davis' testimony is also impeached by his claim that his alleged conversation with Mr. Japp, Sr. took place about 6:15 P.M. on October 3, 1975, "shortly after the meeting". The testimony of Lull, and others, was that the meeting with the tractor-trailer drivers held that afternoon at 5:00 P.M. was of short duration, and was over no later than 5:30 P.M. (App. 446-447, 1067-1068)

The Administrative Law Judge also found that Jays (through Mr. Marttila, Executive Vice President of Marketing), did on or about October 3, 1975 on the one hand grant a 32 cents per hour wage increase to its tractor-trailer drivers in violation of Section 8(a)(1) of the Act, and did, on the other hand at the same time, in violation of the Act, threaten to withhold said 32 cents per hour wage increase from those tractor-trailer drivers who engaged in union activities.

There is no substantial evidence in the record to sustain either of these unwarranted conclusions and findings.

First as to, the 32 cent per hour wage increase which Mr. Marttila announced at the meeting with the truck drivers held on October 3, 1975, this was not something new or unexpected that the respondent suddenly came up with like a bolt from the blue. It was part of a semi-annual series of wage increases that the Respondent, Jays, had previously negotiated out, after extensive negotiation and bargaining, with the Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) in January, 1974 (as reflected on page 3 of the unexecuted Collective Bargaining Agreement identified as Respondent's Exhibit No. 15), when the Union was the collective bargaining agent of the truck drivers (having won an NLRB election and having been certified on November 7, 1973 in Case No. 13-RC-13144); and which Mr. Marttila, on behalf of the Respondent, had voluntarily committed the Company to live up to after the Union on February 13, 1974 had walked away from representing the truck drivers when the truck drivers rejected the proposed union contract. (App. 930-933) This was the raise that the unexecuted Collective Bargaining Agreement had contemplated that the respondent, Jays, would give on July 1, 1975 and which the truck drivers had, at Mr. Marttila's request back in June or July, 1975, unanimously agreed to defer because of tight economic conditions upon the part of the respondent at that time. (App. 292-294, 934-937)

Secondly, there is nothing in the record to indicate that the granting of the 32 cent per hour wage increase on or about October 3, 1975 was in any way related to any union activity or was in any way given to induce the truck drivers to refrain from engaging in union activities. (App. 211-212, 440-441, 507-508, 940, 1178-1180)

The Administrative Law Judge's finding that Marttila had threatened to withhold the 32¢ per hour wage increase is predicated on Lull's controverted and disputed testimony that Marttila, in announcing the raise, had allegedly said: "I hear a few of you fellows have contacted a union. . . . . If I knew who the union people were who had participated in this . . . I would hold back the 32 cents, but since I don't know, the only thing I can do is give it to everybody"; and had further allegedly said (allegedly referring to the prior unexecuted union contract with the Chicago Truck Drivers' Union): "I don't know what the hell you fellows want, but if you want a union, why don't you go back to Fenner's Union because he got you this . . . . You fellows aren't loyal to anyone but yourselves (App. 269).

Mr. Marttila's testimony was that in his talk to the men that he made no reference to any union activity by the men, and made no threat to hold back the 32¢ per hour wage increase from any of the men because of this. He did say (because of reports that he had received from Bob Neal, the shipping supervisor that some of the drivers were "dogging it",—that is, taking more time with the deliveries and unloading than was required) that not all the men deserved the raise, and that in giving the raise the Company was living up to its voluntary commitment, made to the men after Fenner's union walked away, to live up to the wage increases that had been negotiated with Fenner's union. (App. 939-940). Mr. Marttila's version of what was said at that meeting is supported and corroborated not only by other management personnel (App. 211-212, 1178-1180), but by the testimony of James Paluch, one of the tractor-trailer drivers called as a witness by the General Counsel of the Board), who testified that there were no strings attached to Marttila's wage

increase announcement, and that Marttila never threatened to take back the proposed increase because of the men going to the union (App. 441-442).

The Administrative Law Judge chose to credit Lull's version of what was said by Marttila, despite the countervailing evidence noted above. Even if Lull's testimony is credited, it is respectfully submitted that the same does not constitute "substantial evidence on the record as a whole" as to Jays' motivation in contracting out its cartage operations to Nielsen. Nor would Marttila's statement, even under Lull's version, constitute such actionable threat or coercive statement as would constitute an unfair labor practice in violation of the Act; since the alleged threat was at best a toothless one, since Marttila, from Lull's own testimony, admittedly did not know or indicate that he knew who of the tractor-trailer drivers were engaged in union activity, and that admittedly all the men got the raise without exception (App. 269).

The relevance and weight given by the Administrative Law Judge to the "minutiae" noted aforesaid is far disproportionate to the weight that can and should be given the same under the substantiality test of *Universal Camea,* supra, and is far outweighted by: (1) the substantial and uncontroverted evidence in the record that Jays had valid and bona fide business and economic reasons for getting rid of its cartage operations and contracting the same out to a professional cartage trucking firm, and stood to effectuate substantial cost savings by doing so; (2) the fact that Jays' on-going negotiations with Nielsen, detailed aforesaid, commencing on May 21, 1975 *antedated in its inception and progression* any overt union activities by any of the tractor-trailer drivers; (3) the fact that Jays had several years before negotiated a

collective bargaining agreement with the Chicago Truck Drivers Union in connection with the same tractor-trailer drivers, when the men in a NLRB election had voted to have said union as their collective bargaining agent, thus demonstrating Jays' willingness to negotiate and live with a union where its employees had voted for a union; and (4) by the fact that the alleged union activities of some of the drivers in going to Teamsters Local No. 705, was at best short-lived and sporadic (at most over a period of a little more than two weeks, from mid-September, 1975 to October 4, 1975), *and did not commence until subsequent* to Mr. Nielsen's inspection of Jays cartage operations and the driver log books at the Jays' plant on September 2nd or 3rd, 1975, a fact that quickly became known to the tractor-trailer drivers and gave rise to the rumors that Jays was considering or was going to farm out its cartage operations,—from which it could reasonably be inferred that the sudden union activity upon the part of some of its driver-salesmen *was the result of, and not the cause of,* Jays' negotiations with Nielsen; an inference that the Administrative Law Judge, to whom every move or decision of management was suspect, never even considered.

What the Administrative Law Judge has done is to repeatedly distort the record, under the guise of unwarranted credibility findings, by reading into it, by unwarranted inference after unwarranted inference, particularly where the evidence adduced by the respondent is uncontroverted, his own colored interpretation of that evidence and his own value judgment of what management should or should not have done in deciding to contract out the Jays cartage operation.

When all is said and done, it is this time sequence of events, and not the disputed minutiae and bits and pieces

credited by the Administrative Law Judge which purport to support a decision unfavorable to the employer, which should be the yardstick by which Petitioner's real motive for contracting out its cartage operations should be fairly measured.

In *National Labor Relations Board* v. *Houston Chronicle Pub. Co.,* 211 F. 2d 848, 851, 854-55 (C.C.A. 5th—1954), denying enforcement of the Board's order in 101 N.L.R.B. 1208 (1953), where respondent had abolished its newspaper circulation department and had instituted an independent contractor system of distribution, the Circuit Court of Appeals said:

> "The issue is not whether the business reasons advanced by the respondent were good or bad, but whether the respondent actually in good faith had business motives for the change, or whether the change was illegally motivated.
>
> • • •
>
> ". . . the Board observed that respondent's illegal motivation was also inferrable from the precipitate manner in which respondent effected the change-over to the independent contractor system. We do not think that, because the respondent accelerated the change-over in order to avoid anticipated union interference, it necessarily follows that the original decision to change was to defeat union organization efforts. It is the motive for the decision to change-over that is material to this controversy rather than the motive for accelerating the change-over.
>
> "When the Board could as reasonably infer a proper motive as an unlawful one, substantial evidence has not proved the respondent to be guilty of an unfair labor practice. Motives are notoriously susceptible of being misunderstood and hard to prove or to disprove. If an ordinary act of business management can be set aside by the Board as being improperly motivated, then indeed our system of free enter-

prise, the only system under which either labor or management would have any rights, is on the way out, unless the Board's action is scrupulously restricted to cases where its findings are supported by substantial evidence, that is evidence possessed of genuine substance. In our opinion, this is not such a case."

In *Valley Forge Flag Company* v. *N.L.R.B.*, 364 F.2d 310, 311 (C.A. 3rd, 1966), the Third Circuit noted:

> Several circuits have held that a predominant economic motive to subcontract or to close the plant and transfer operations, even though accelerated by union organizing efforts, does not constitute a violation of the Act. *NLRB* v. *New England Web, Inc.*, 309 F.2d 696 (C.A. 1, 1962); *NLRB* v. *Rapid Bindery, Inc.*, 293 F.2d 170, 173-175 (C.A. 2, 1961); *Jays Foods, Inc.* v. *NLRB*, 292 F.2d 317 (C.A. 7, 1961); *NLRB* v. *Lassing*, 284 F.2d 781 (C.A. 6, 1960), cert. denied, 366 U.S. 909, 81 S.Ct. 1085, 6 L.Ed.2d 235 (1961); *NLRB* v. *Houston Chronicle Pub. Co.*, 211 F.2d 848 (C.A. 5, 1954). Compare *NLRB* v. *Preston Feed Corp.*, 309 F.2d 346, 350-352 (C.A. 4, 1962); *NLRB* v. *Brown-Dunkin Co.*, 287 F.2d 17 (C.A. 10, 1961). See also annot., 5 A.L.R.3d 733 (1966)."

In the following additional cases, among others, it was held that the contracting out of work did not constitute an unfair labor practice within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act as amended, on the ground that the employer's motive for the subcontracting was based on economic considerations:

N.L.R.B. v. *R.C. Mahon Co.*, 269 F.2d 44 (C.A. 6, 1959).

N.L.R.B. v. *Drennon Food Products Co.*, 272 F.2d 23 (C.A. 5, 1959).

N.L.R.B. v. *J. Mitchko, Inc.*, 284 F. 2d 573 (C.A. 3, 1960).

N.L.R.B. v. *W. L. Rives Co.*, 288 F. 2d 511 (C.A. 5, 1961).

Jays Foods, Inc. v. *N.L.R.B.*, 292 F. 2d 317 (C.A. 7, 1961).

N.L.R.B. v. *Adkins Transfer Co.*, 226 F.2d 324, 326 (C.A. 6, 1955).

N.L.R.B. v. *Kingsford*, 313 F. 2d 826 (C.A. 6th, 1963).

N.L.R.B. v. *Lassing*, 284 F.2d 781 (C.A. 6, 1960), cert. denied 366 U.S. 909, 81 S.Ct. 1085, 6 L.Ed. 2d 235.

As is pointed out in *N.L.R.B.* v. *Garner Tool and Die Manufacturing, Inc.*, 493 F. 2d 263, 267-268 (C.A. 8, 1974):

> "Thus the Board's findings may not rest on 'suspicion, surmise, implications, or plainly incredible evidence.' *Amyx Industries, Inc.* v. *N.L.R.B.*, 457 F. 2d 904, 907 (8th Cir. 1972); see also Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 484, 71 S. Ct. 456, 95 L. Ed. 456 (1951). And, as we have previously stated 'circumstances that merely raise a suspicion that an employer may be activated by unlawful motives are not sufficiently substantial to support a finding.' *N.L.R.B.* v. *Ace Comb Co.*, 342 F. 2d 841, 848 (8th Cir. 1965).

It is respectfully submitted (to paraphrase *Labor Board* v. *Pittsburgh S.S. Co.*, 337 U.S. 656, 660 69 S.Ct. 1283, 93 L.Ed. 1602 (1949), that much of the testimony credited by the Administrative Law Judge "carries its own death wound", and much of Petitioner's unrebutted testimony rejected by the Administrative Law Judge "carries its own irrefutable truth." For the Court of Appeals, therefore, to give the uncritical deference that it does to the

unwarranted findings, inferences and conclusions of the Administrative Law Judge, is not only grossly unfair to the Petitioner, but is inconsistent with the mandate expressed in the *Universal Camera Corp.* case, that the Court of Appeals in reviewing Labor Board cases should not abdicate their reviewing function. For if the Court of Appeals believes, as it does, that the Olson case is so close "that it teeters on the balance", and if it were deciding the case de novo "we might very well have made findings and conclusions contrary to some of the Board's determinations", then clearly the evidence adduced on behalf of the Petitioner must carry with it enough of its own "irrefutable truth", and the testimony credited by the Administrative Law Judge carries enough of its own "death wounds", to warrant the Court concluding that the findings, inferences and conclusions of the Administrative Law Judge are not supported by "substantial evidence on the record considered as a whole."

IV. The Propriety Of The Remedy:

Section 10(c) of the National Labor Relations Act, as amended by The Labor Management Act of 1947 (29 U.S.C.A. Sec. 160(c)), provides, among other things as follows:

> *"No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause . . ."* (Emphasis ours)

As previously pointed out, the Court of Appeals in the instant cause was moved to say (Emphasis ours):

> "We recognize, as did the Board, that *Olson was negligent in the discharge of his duties"*; and
>
> • • •

> *"There may have been other, justifiable reasons for its discharge"*, other than his union activity;

In light of the statutory mandate aforesaid, and the Court of Appeals recognition that there were justifiable reasons for Olson's discharge ,other than his union activity, it is respectfully submitted that the Board and the Court of Appeals erred in ordering Jays to offer Olson reinstatement to his former job, with back pay. See sub-paragraph 2(a) of the Judgment Order, entered by the Court of Appeals on May 23, 1978 (Appendix "D").

Sub-paragraph 2(b) of said Judgment Order of the Court of Appeals provides as follows:

> "(b) In the event Respondent Jays Foods, Inc. resumes its delivery operations which were contracted to Nielsen Brothers Cartage, Inc., on or about November 17, 1975, *or withdraws such delivery operations from Nielsen Cartage,* offer the employees named below" (some 26 employees) "immediate and full reinstatement to their former jobs, in accordance with the provisions of paragraph number II of the Section entitled 'The Remedy' above." (Emphasis ours)

Jays has objected to both sub-paragraphs 2 (a) and 2 (b) of the Judgment Order, and has suggested as it relates to sub-paragraph 2 (b) aforesaid Order that the underscored clause *"or withdraws such delivery operations from Nielsen Cartage"* should be deleted from the Order for the following reasons. Although Nielsen Cartage has and is continuing to handle Jays' cartage operations on a satisfactory basis, at a cost savings to Jays compared to what it would have cost Jays to handle its own cartage operation, it is possible in the future that Jays, for any number of valid business reasons (including any deterioration in the quality of service and any

unwarranted increases in the contract rates charged by Nielsen in the future), may deem it desirable to shift its cartage operations from Nielsen to other third party cartage companies. It should have the right to do so, without having an obligation to offer the named former tractor-trailer drivers reinstatement to jobs that don't exist (so long as Jays itself does not resume its cartage operations). The clause as it now reads would, if Jays were to shift its cartage operations to cartage firms other than Nielsen, create an unwarranted problem as to whether Jays by reason thereof would have to offer reinstatement to its former tractor-trailer drivers, even though Jays itself was not reassuming its own cartage operations. In addition, a reasonable time limit should be placed on the operation of sub-paragraph 2(b) so that it does not operate as an indefinite and unwarranted restraint on petitioner's operations in the future.

ARGUMENT AMPLIFYING REASONS FOR ALLOWANCE OF WRIT

From the foregoing, it should be apparent that the Court of Appeals in the instant cause has misapprehended the criteria or tests for determining what constitutes "substantial evidence on the record considered as a whole", thereby unduly fettering, restricting and limiting the permitted scope of its review and the exercise of its independent judicial judgment; and has misapplied the standard of review set forth in the *Universal Camera* case, *supra*.

For one thing, it is obvious that the Court of Appeals in the instant cause, in reviewing the findings of the Board to determine whether or not they are supported by "substantial evidence on the record considered as a whole", has not exacted of the Board, or of itself, that the Board's

findings meet the Congressional mandate, standard and test (recognized by the Board's own rules) of being supported by *at least a preponderance of the credible evidence*, or *the weight of the credible evidence*.

The purported evidence on which the Court of Appeals is prepared to let the Board infer (to use the language of the Court of Appeals) "that Olson's discharge was due *in part at least* to his union activity", and that Jays' decision to contract out to Nielsen "was motivated *at least in part* by antiunion considerations" (emphasis ours), is certainly not such as would constitute at least a preponderance of the credible evidence, or the weight of the credible evidence; and is certainly something less than a preponderance of the credible evidence.

The Court of Appeals in the instant case also misconceives the scope of its review as it relates to credibility determinations made by the Administrative Law Judge when it says in its opinion "it is the function of the Administrative Law Judge and the Board to make credibility determinations, not this Court." (Appendix "A", infra, p. 12a). As Justice Frankfurter pointed out in *N.L.R.B.* v. *Walton Manufacturing Co.*, 369 U.S. 404, 418-419, 82 S.Ct. 853, 7 L.Ed. 2d 829 (1961), heretofore cited in detail, "due regard for the trier of fact does not require appellate impotence," and administrative determinations of credibility can and should be set aside where the reviewing court believes that a fair estimate of the worth of the testimony of witnesses precludes the Board's credibility findings, or where the reviewing court believes that the evidence supporting that determination is less credible than the opposing evidence.

There are repeated examples of unwarranted credibility findings by the Administrative Law Judge in the

instant cause, particularly in the Olson case, as hereinbefore detailed whose supporting evidentiary base is far less credible than the opposing evidence. In deferring to and uncritically accepting these unwarranted findings at face value, the Court of Appeals has in effect emasculated its reviewing function contrary to the spirit and intent of the *Universal Camera* case, supra.

It is not clear from a reading of the opinion of the Court of Appeals in the instant cause, what criteria or tests the Court used in determining whether the findings of the Board are or are not supported by "substantial evidence on the record considered as a whole", as mandated by the *Universal Camera* case, *supra.* As previviously pointed out, the opinion merely refers to *N.L.R.B.* v. *Columbian Enameling & Stamping Co.,* 306 U.S. 292, 300, 59 S.Ct. 501, 505, 83 L.Ed. 660 (1939), a case antedating the amendments made to the National Labor Relations Act by the Labor Management Relations Act of 1947, where the Supreme Court said:

> "Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, *Consolidated Edison Co.* v. *National Labor Relations Board, supra,* p. 229, and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. See *Baltimore & Ohio R. Co.* v. *Groeger,* 266 U. S. 521, 524; *Gunning* v. *Cooley,* 281 U. S. 90, 94; *Appalachian Electric Power Co.* v. *National Labor Relations Board, supra,* 989."

The Court of Appeals reference to the *N.L.R.B.* v. *Columbian Enameling & Stamping Co., supra,* would seem

to indicate that the Court of Appeals predicated its criteria or test for determining whether the findings of the Board are or are not supported by "substantial evidence on the record considered as a whole" on an evidentiary standard and standard of proof far less demanding than that mandated by the Congress in Section 10(c) of the National Labor Relations Act, as amended by The Labor Management Relations Act of 1947, and the *Universal Camera* case, *supra.* The Court of Appeal's opinion reflects that lesser evidentiary standard of proof, and is in error.

Nor does the Court of Appeals in the instant cause follow the criteria or test in *Torrington Company* v. *N.L.R.B., supra,* which holds, consistent with the standard and burden of proof imposed on the Board by Section 10(c) of the Act, that the substantial evidence test is not satisfied by evidence "which gives equal support to inconsistent inferences."

It should be also noted that the decision of the Court of Appeals in the instant cause is in conflict with decisions in other circuits as heretofore noted, which have held that "a *predominant economic motive* to subcontract . . . ., even though accelerated by union organizing efforts, does not constitute a violation of the Act." It is also in conflict with a previous decision of the Seventh Circuit in the case of *Jays Foods, Inc.* v. *N.L.R.B.,* 292 F.2d 317 (C.A. 7, 1961), involving the same petitioner herein, in an unrelated case where the termination of its automotive repair and maintenance department (which had existed for many years), and the farming out of its automotive repair and maintenance work to outside garages was held to be perfectly proper.

CONCLUSION

Wherefore, Petitioner respectfully prays that this Petition for a Writ of Certiorari be granted, and that upon hearing and review of this cause that the judgment order of May 23, 1978, of the Court of Appeals for the Seventh Circuit be reversed, set aside and held for nought, and this cause remanded to said Court of Appeals with appropriate directions.

Respectfully submitted,

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No. 78-5[illegible]

In the

Supreme Court of the United States

OCTOBER TERM, 1978

JAYS FOODS, INC. and NIELSEN BROTHERS CARTAGE CO., INC.,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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APPENDIX A

No. 77-1326

JAYS FOODS, INC. and NIELSEN BROTHERS CARTAGE CO., INC.,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR REVIEW

ARGUED OCTOBER 28, 1977 — DECIDED MARCH 15, 1978

Before SPRECHER, *Circuit Judge,* COWEN*, *Senior Judge* and WOOD, *Circuit Judge.*

COWEN, *Senior Judge.* Petitioner, Jays Foods, Inc. (hereinafter Jays), asks this court to review and set aside an order of the National Labor Relations Board disposing of two consolidated cases heard before the Board. The question before us is whether substantial evidence on the record as a whole supports the Board's findings that Jays violated the National Labor Relations Act sections 8(a)(1) and (3), 29 U.S.C. sections 158(a)(1) and (3) (1970).[1]

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* Senior Judge Wilson Cowen of the United States Court of Claims is sitting by designation.

[1] The Act Provides:

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title [the right to organize, form, join, or assist labor organizations];

• • •

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization • • •"

We find this a close and difficult case in which there is a great deal of conflicting evidence on many of the crucial questions. If we were deciding the case *de novo,* we might very well have made findings and conclusions contrary to some of the Board's determinations. However, we adhere to the limited scope of our review, and after reviewing the 1326-page record, we have concluded that the Board's findings regarding Jays' violations of the Act are supported by substantial evidence. Nevertheless, we find that the remedy provided by the Board in one case, 13CA-13889, is contrary to the recommended decision of the Administrative Law Judge and is not warranted by the record before us. Therefore, we hold the Board's order in this aspect to be an abuse of discretion and modify it to conform to the recommendations made by the Administrative Law Judge.

Board Disposition

The following is a statement of the facts to the extent deemed necessary for decision. The statement adheres to the Board's findings, which adopted those made by the Administrative Law Judge after he had sifted and weighed the voluminous and conflicting evidence presented during the 8 days of hearings before him.

Jays is an Illinois corporation which produces and packages snack foods in Chicago. The company asserts it is the largest independent snack food producer in the United States, with annual gross sales in excess of $30 million. In the fall of 1975 Jays employed 26 tractor-trailer drivers, who delivered Jays' products from its production plant in Chicago to its distribution centers (hereinafter branches) in the Chicago area and to independent distributors in four states. Jays has a much larger group of employees, called route salesmen, who deliver and sell Jays' products from its branches in the Chicago area to retail stores in the area.

A. *Edward Olson's case*

Until December 1, 1975, when he was discharged, Edward Olson was one of the route salesmen. At the time of

his discharge, Olson had worked for Jays for over 20 years, and at his branch, the West Branch, he stood first in seniority among 24 salesmen. Earlier in 1975, Olson had become concerned that Jays' route salesmen were not represented by a union. On his own, he contacted the Retail Clerks Union in an effort to have that union organize Jay' route salesmen. At the union's request, he openly distributed union authorization cards among the other 23 route salesmen at the West Branch, and successfully solicited 19 signatures. He also persuaded a number of his fellow salesmen to attend a dinner meeting with union representatives. Jays' West Branch supervisor, William Brand, was aware of this meeting. At the election conducted by the N.L.R.B. on October 2, 1975, the union lost. Olson served as the union observer of the election for the West Branch.

Immediately following that October 2 election, Jays' company president, Leonard Japp, Sr., approached Olson, extended his hand, and in an unfriendly, insincere tone said, "Thanks a lot, Ed." Then, for a period of time during November 1975, Jays' executive vice-president, Silas Marttila, ordered the newly appointed West Branch Assistant Manager, Donald Skafgaard, to follow Olson on his route because Olson was pro-union and because his sales were down. On Monday, December 1, 1975, after Olson had apparently disregarded one of his sales duties the previous Friday, the day after Thanksgiving, he was fired. Olson had not previously been warned, disciplined, or suspended for a similar neglect of his duties. In fact, there was no evidence Olson had ever disregarded such duties in his previous 20 years of employment with Jays. Jays alleges that Olson was fired for the following reasons:

> Very poor sales, lowest in West Branch. Caused by least amount of on-job sales time, 4 days only week of 11/29/75. He allowed two accounts, one Jewel and one National, to be out of stock on Jays items for the week-end 11/29 & 11/30 due to no-sale by him 11/28/75.
>
> • • •

> No arrangements made by E. Olson for delivery of product on Saturday 11/29/75. He knowingly permitted and approved out of stock for Customers & resultant loss of sales to Customers & Jays when he checked out for the week 11/29/75 disregarding opportunity available for completing his Route Sales on 11/29/75, increasing his sales commissions and satisfying Jays Customers. [Petitioner's app. 65-66.]

The Board adopted findings with respect to Olson's negligent performance on the 1975 Thanksgiving weekend that:

> • • • the discharge of a new employee might not be noteworthy, although the record indicates that the discharge of [route] salesmen by Jays is not frequent. However, the discharge of a salesman with over 20 years seniority who apparently had never done anything like this before requires closer consideration. • • • [Petitioner's app. 69-70.]

After closer consideration, the Board noted that while Olson's dollar volume of sales had been consistently in the lower half among the salesmen at the West Branch, his sales were not consistently lowest, as Jays alleged. The Board also found that Olson's route was smaller in size and lower in sales potential than other more lucrative West Branch routes. This was borne out by the fact that Olson's replacement continued to have low rankings among the West Branch salesmen after Olson's discharge. Finally, as to the incident, which allegedly precipitated Olson's firing, the Thanksgiving weekend non-delivery, the Board found that although Olson in fact had failed to service the Jewel store, he was not allowed to service the store because he arrived there 10 to 20 minutes after Jewel's receiving hours on Friday. Moreover, when Mr. Brand, the West Branch supervisor, had been apprised of the non-delivery by Olson when he checked out for the week that afternoon, Branch did not remind Olson to service the Jewel store on Saturday. As to the National store, Olson testified that he had checked the stock at that

store; that the shelves had a supply of 3 dozen Jays' snack items, and that the manager at that store would not, as a regular policy, permit additional Jays' stock to be placed in the store's backroom. On the whole, the Board concluded that "Olson was discharged for his union activities and the reasons advanced by Jays are pretexts." [Petitioner's app. 71.]

B. *The tractor-trailer drivers' case*

During the late summer and early fall of 1975 some of Jays' tractor-trailer drivers (hereinafter truckdrivers) became convinced that Jays' management was not acting in good faith regarding an agreement previously made between management and the truckdrivers. Because of Jays' claimed short-term financial difficulties, it was agreed that Jays could defer until January 1, 1976, a wage increase which the management originally promised to grant on July 1, 1975. During September, one driver, Richard McCormick contacted the Teamsters' Union to discuss the possibility that the Teamsters might organize Jays' truckdrivers. Six of the truckdrivers met with agents of the Teamsters on September 26 at the Teamsters' hall. At that time, the six signed authorization cards and scheduled a meeting for Saturday, October 4, between the Teamsters and as many of the other 26 truckdrivers as the six could convince to attend. During the following week, while at work, the six truckdrivers tried to persuade their fellows to attend the October 4 meeting.

On Friday evening, October 3, Jays' executive vice-president, Marttila, called a special meeting of the truckdrivers. He announced that the financial condition of Jays had improved and that the company would make the deferred raise effective immediately instead of waiting until January 1, 1976. He added, however, that he had heard "a few" of the "fellows have contacted a union," and if he knew who these truckdrivers were, he would not give them the raise, but since he did not know, he would have to give the raise to everyone. He also told them if they wanted a union, they should return to the union which had previ-

ously represented them and which they had since rejected. He finished with the statement that "you fellows aren't loyal to anyone but yourselves." [Petitioner's app. 38-39.]

Shortly after this meeting with Marttila, company president Japp met truckdrivers Davis and Dietz in the company dispatch office where he inquired whether they intended to attend the meeting the next day. They gave noncommittal replies, to which he responded that if the truckdrivers signed cards to bring in the union he would "close the doors."

On a number of occasions during September, October, and November 1975, John Staton, who supervises Jays' loading dock employees, asked various truckdrivers if they had contacted a union. The truckdrivers consistently responded in the negative. Staton also inquired why they wanted a union, to which there was either no response or a noncommittal one. On at least two occasions he added that if the truckdrivers kept fooling around with the union, the "old man," Jays' president, Japp, was going to sell the trucks, that is, contract out the tractor-trailer facet of Jays' operations to a hauling contractor.

A similar statement that the "old man" was getting "pretty mad" and was "going to sell the trucks" was conveyed to truckdriver James Paluch by Arthur Timmons during one of Paluch's deliveries to Jays' North Branch after the October 3 meeting. Timmons is Japp's son-in-law and his wife is a company stockholder. Timmons performed specialized duties for vice-president Marttila and frequently substituted for branch managers who were absent for one reason or another.

On November 14, 1977, Marttila informed the truckdrivers that Jays had contracted out its tractor-trailer operation to Nielsen Cartage Company. Nielsen took over the operation on November 17, 1977, and hired 15 of Jays' 26 truckdrivers. At that time, Nielsen did not hire most of the key union proponents, almost all of whom were among the top half of Jays' truckdrivers with respect to seniority. Later, in January 1976, Nielsen hired eight of the

11 remaining former truckdrivers, bringing the total number of former Jays' truckdrivers employed by Nielsen to 23 out of 26.

Except for a few statements made by John Staton, Jays' Assistant Shipping Supervisor, the testimony of Jays' executives and supervisory officials was contrary to the testimony of witnesses relied on by the Administrative Law Judge in making his findings. Jays' executives and officials claimed that the contract with Nielsen was motivated solely by economic considerations and that they were convinced that Jays could save $60,000 to $100,000 per year by contracting out the hauling operation to Nielsen. They further asserted that the Nielsen deal was basically formed and nearly solidified in late August and early September of 1975, prior to any union activity by Jays' truckdrivers. The Board found, however, that Jays had consistently spurned Nielsen's approaches for a number of years and did not seriously consider and decide to accept Nielsen's offer until late September and early October of 1975, a time frame contemporaneous with the union activity of Jays' truckdrivers discussed above.

In summary, the Board found persuasive evidence to support its conclusions that: (a) By contracting out its delivery operations because of the union activities of its employees, Jays had engaged in unfair labor practices in violation of sections 8(a)(1) and (3) of the Act; (b) By discharging its truckdrivers on account of their union activities, Jays had engaged in unfair labor practices in violation of sections 8(a)(1) and (3) of the Act, and (c) By threatening to sell its trucks and to close its doors because of the union activity of its employees, by granting benefits to them to discourage union activities, by threatening to withhold benefits because of employee union activities, and by coercively interrogating employees concerning union activities, Jays had engaged in unfair labor practices in violation of section 8(a)(1) of the Act. The Board also concluded on the basis of its findings that by discharging Edward Olson on account of his union activities, Jays had engaged in unfair labor practices in violation of sections 8(a)(1) and (3) of the Act.

The Olson Case

We first consider Jays' challenge to the Board's findings pertaining to Edward Olson. We recognize, as did the Board, that Olson was negligent in the discharge of his duties. But in *N.L.R.B.* v. *Fairview Hospital,* 443 F.2d 1217, 1219 (7th Cir. 1971), it is stated:

> As this Court has long recognized, the existence of valid grounds for punitive action is no defense unless such action was predicated solely on these grounds and not by a desire to discourage protected activity. • • •

Therefore, the issue is whether there is substantial evidence to support the Board's finding that Olson's discharge was motivated, at least in part, by his union activity, even though there may have been other, justifiable reasons for his dismissal. *N.L.R.B.* v. *Tom Wood Pontiac, Inc.,* 447 F.2d 383, 386 (7th Cir. 1971); *Borak Motor Sales, Inc.* v. *N.L.R.B.,* 425 F.2d 677, 680-81 (7th Cir. 1970). The Board essentially found that the reasons advanced by Jays to justify Olson's discharge were contrived and inadequate in the face of close scrutiny. *See N.L.R.B.* v. *American Casting Serv., Inc.,* 365 F.2d 168, 172 (7th Cir. 1966).

The discharge of Olson presents by far the closest and most difficult question in this case, so close that it teeters on the balance. However, Jays has not persuaded us that the Board made unreasonable inferences from the direct and circumstantial evidence. The facts with respects to the Olson situation are comparable to those before the court in *Tom Wood Pontiac, Inc., supra,* which upheld the Board's decision. There is enough evidence from which a reasonable person might justifiably infer that Olson's discharge was due in part at least to his union activity. This is enough for affirmance of the Board's decision. *N.L.R.B.* v. *Columbian Co.,* 360 U.S. 292, 300 (1939).

Jays relies upon several cases decided by other circuit courts, which overturned Board determinations that the Act had been violated by the discharge of an employee involved in union activity. *N.L.R.B.* v. *Monroe Auto Equip.*

Co., 368 F.2d 975, 979-81 (8th Cir. 1966); *N.L.R.B.* v. *Garner Tool and Die Mfg. Co.,* 493 F.2d 263, 267-68 (8th Cir. 1974); *N.L.R.B.* v. *United Parcel Service Inc.,* 317 F. 2d 912, 914 (1st Cir. 1963); *N.L.R.B.* v. *Prince Macaroni Mfg. Co.,* 329 F.2d 803, 806 (1st Cir. 1964); *N.L.R.B.* v. *Dixie Terminal Co.,* 210 F.2d 538, 540, *cert. denied,* 347 U.S. 1015 (1954). All of those cases are distinguishable, either because the employee had blatantly refused to accept a new assignment; because the employee had repeatedly violated company rules and was very insubordinate; because there was no evidence of anti-union feeling, or because there was no evidence that the company was aware of the employees's union activities. Clearly, there is more evidence here to support the Board finding than in those cases.

The Truckdrivers' Case

We now consider Jays' challenge to the Board's findings relative to the truckdrivers. It is well settled that an employer violates section 8(a)(1) of the Act when he engages in conduct which tends to interfere with his employees' rights to organize, form, join, or assist a union organization. *N.L.R.B.* v. *Illinois Tool Works,* 153 F.2d 811, 814 (7th Cir. 1946). Furthermore, in determining whether a violation occurred, the impact of all the statements made by management must be judged in the context of the effect they would have on an employee while he is in the employer-employee relationship. *N.L.R.B.* v. *Roselyn Bakeries, Inc.,* 471 F.2d 165, 167 (7th Cir. 1972). In considering the interrogations made on this matter by Jays' managers, Japp, Timmons, and Staton, the Board could reasonably conclude that these interrogations were unlawful. *See New Alaska Dev. Corp.* v. *N.L.R.B.,* 441 F.2d 491, 492-93 (7th Cir. 1971). The questions asked were not accompanied by assurances that there would be no reprisals. The fact that Japp, Staton, and Timmons all consistently received untruthful or noncommittal responses is evidence of the employees' anxiety over management's reaction to their union activity. Anxiety is symptomatic of fear, and it is unlawful to question so as to instill fear. *See Self-Reli-*

ance Ukrainian American Cooperative Ass'n v. *N.L.R.B.*, 461 F.2d 33, 36 (7th Cir. 1972). The questions asked by Jays' managers of their employees were not the isolated interrogatories, free of coercion, which are protected by *N.L.R.B.* v. *Century Broadcasting Corp.*, 419 F.2d 771, 780 (8th Cir. 1969), and other cases cited to us by petitioner.

Jays argues that the Staton interrogations, the bulk of the interrogations in the record, did not violate the Act because Staton was not a supervisor within the meaning of the Act, and because the company was not aware of and did not authorize Staton's questioning. Precedent and a fair reading of the Act constrain us to reject this argument. The Act states:

> § 152. Definitions.
>
> When used in this subchapter—
>
> (2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly • • •.
>
> (13) In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. [29 U.S.C. §§ 152(2) and (13) (1970).]

The Supreme Court has stated that in this context of agency, we should not require a "strict application of the rules of *respondeat superior.*" We are dealing with a "clear legislative policy to free the collective bargaining process from all taint of an employer's compulsion, domination, or influence." *International Ass'n of Machinists* v. *N.L.R.B.*, 311 U.S. 72, 80 (1940). In this case, the Board found Staton to be a supervisory employee with the authority, at least, to fire employees. In the light of the Supreme Court's liberal definition of agency in labor cases, Staton qualifies as an "employer" within the meaning of the Act. Furthermore, the possibility that the company may not have authorized or known of Staton's questioning does not free Jays of responsibility for his actions. *Local*

636, United Ass'n of Plumbing and Pipefitting Industry v. *N.L.R.B.*, 287 F.2d 354, 361 (D.C. Cir. 1961).

The threats and promises made by Marttila and Japp were also unlawful.

> • • • an employer is free to tell his employees what he reasonably believes will be the likely economic consequences of unionization that are outside his control, as distinguished from threats of economic reprisal to be taken solely on his own volition. • • • [*N.L.R.B.* v. *River Togs, Inc.*, 382 F.2d 198, 202 (2d Cir. 1967), *cited in N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575, 619 (1969).]

The threats made by Marttila and Japp on October 3, 1975, fall in the latter category. Moreover, promises made coincident with threats prior to an important union organizational activity, such as the Saturday, October 4 meeting with the Teamsters, are also illegal. *See Wassau Steel Corp.* v. *N.L.R.B.*, 377 F.2d 369, 371-72 (7th Cir. 1967).

With respect to the decision by Jays to contract its trucking operation to Nielsen Cartage Co., this court has stated in *N.L.R.B.* v. *Townhouse T.V. & Appliance, Inc.*, 531 F.2d 826, 828-29 (7th Cir. 1976) that:

> It is well settled that an employer violates Sections 8(a)(3)and (1) of the Act by subcontracting part of an integrated business and dismissing the persons employed therein if the action is motivated at least in part by antiunion considerations. • • •

In view of Jays' illegal campaign to prevent its truckdrivers from joining the Teamsters' union, coupled with the fact that Jays was satisfied with performing its own trucking operation until a time almost simultaneous with the truckdrivers' union activity, the Board could reasonably conclude that Jays' decision to contract to Nielsen was motivated at least in part by antiunion considerations. Thus this case is distinguishable from *Jays Foods, Inc.* v. *N.L.R.B.*, 292 F.2d 317 (7th Cir. 1961), wherein Jays' decision to contract out its truck repair and maintenance op-

erations was found to have been made solely to avert a threatened economic loss. The facts in that prior case established that Jays had seriously considered contracting out its maintenance operations on several occasions for almost 1½ years prior to making its decision to do so. We reject Jays' arguments on this issue. The cases which it cites, *N.L.R.B.* v. *Kingsford,* 313 F.2d 826, 829 (6th Cir. 1963); *N.L.R.B.* v. *Lassing,* 284 F.2d 781 (6th Cir. 1960), and other cases, are distinguishable. In those cases the court found that the contracts involved were made solely for economic reasons.

Jays also challenges the sufficiency of the evidence relied upon by the Board. But we find there is substantive circumstantial and direct evidence to support the Board's decision. It is the kind of evidence the Supreme Court decided is sufficient to uphold the Board's decision. *See N.L.R.B.* v. *Ling-Belt Co.,* 311 U.S. 584, 602 (1941). In essence, our assessment of the record is well stated in a prior decision of this court:

> • • • Under Universal Camera Corp. v. NLRB • • • such findings being supported by substantial evidence on the whole record must be accepted here. Having examined the whole record, we find such substantial support. Even though we might feel inclined to tip the scales the other way • • • we are not at liberty to do so. [*Von Solbrig Hospital, Inc.* v. *N.L.R.B.,* 465 F. 2d 173, 175 (7th Cir. 1972).]

Finally, Jays argues that we should reverse the findings of the Board on both issues because the Administrative Law Judge uniformly credited the N.L.R.B. General Counsel's witnesses in making his determinations of fact. As this court has stated previously "it is the function of the Administrative Law Judge and the Board to make credibility determinations, not this Court." N.L.R.B. v. *Townhouse T.V. & Appliance, Inc., supra,* at 829. Moreover, even "total rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." *N.L.R.B.* v *Pittsburgh Steamship Co.,* 337 U.S. 656, 659 (1949).

Truckdrivers' Remedy

The recommended order of the Administrative Law Judge required Jays to reimburse the 26 discharged truckdrivers "for any loss of pay and benefits • • • until such time as those employees obtain, or have obtained substantially equivalent employment • • •." (Petitioner's app. at 74.) He did not order Jays to resume its trucking operation, because he found that Nielsen had "voluntarily hired 23 of the 26 discharged employees" and "their wages and benefits may be better than enjoyed before Jays contracted out the operation." [*Id.*] The Board, however, reversed the order of the Administrative Law Judge and ordered Jays to resume its trucking operation. The Board found that the remedy of resumption of operations is the normal remedy unless the resumption would create undue hardship. *N.L.R.B.* v. *Townhouse T.V. & Appliance, Inc., supra,* at 831-32. The Administrative Law Judge found Jays to be financially sound and that resumption of its prior operation would not create undue hardship. Therefore, the Board ordered Jays to resume its trucking operation. The Board assumed that although the discriminatees working for Nielsen are now paid a higher hourly wage than Jays paid them, they may have received similar raises had they remained at Jays. Furthermore, the Board noted that at Jays the truckdrivers received some benefits which they do not receive at Nielsen, such as cash Christmas presents, free meals and coffee. Finally, the Board stated that their seniority at Nielsen "may not compare with that enjoyed at Jays Foods." [Petitioner's app. at 109.]

We agree that the resumption of delivery operations by Jays would not be "an undue hardship" as that terms has been interpreted in the decisional law. However, there are other facts in this case which persuade us that the remedy fashioned by the Board for the truckdrivers is not adapted to the situation before us and constitutes an abuse of the discretion vested in the Board.

The Administrative Law Judge found that the evidence would not support a finding that Nielsen knew or should

be charged with knowledge of Jays' unfair labor practices and is not responsible for remedying such unfair labor practices. An order requiring Jays to resume its cartage operations might very well impose an unwarranted hardship on Nielsen, and at the same time be disadvantageous to the 23 truckdrivers employed by Nielsen. There is an offer of proof in the record that the 23 former Jays truckdrivers who were hired by Nielsen, were receiving $7.93 per hour shortly after their being so hired in the early part of 1976, whereas they were being paid only $6.50 per hour in November 1975 while employed by Jays. We accept this as a fact and we note that the Administrative Law Judge assumed that their wages are higher than Jays paid them. In addition, the truckdrivers employed by Nielsen received certain insurance benefits as a result of their mandatory union status which they did not have as employees of Jays. Furthermore, it is uncertain that if Jays were ordered to resume deliveries, it would give the truckdrivers the same increase in pay which they might have received had Jays continued the delivery operations after November 1975. If we were to permit the Board's order to stand, based as it is on speculative and uncertain theories as to what will make the employees whole, the result might well be a reduction in their pay and a loss of other benefits.

Even if Jays is ordered to resume the trucking operation, there is nothing to prevent it from recontracting that operation to Nielsen or some other company for sound business reasons. It is undisputed that Jays has experienced a substantial savings in cost, and it claims an improvement in operating efficiency, as a result of the contract entered into with Nielsen. Consequently Jays could conceivably recontract the delivery operation to Nielsen solely for legitimate business purposes and without any demonstrated motive to violate any of the rights granted to their employees under the law. *See N.L.R.B.* v. *Preston Feed Corp.*, 309 F.2d 346, 352 (4th Cir. 1962). If that were to occur, the 23 truckdrivers now employed by Nielsen would have just cause for believing that the result of this

litigation has been to put them on an employment merry-go-round, each revolution of which is fraught with uncertainty as to whether their lot in life has actually been improved.

Three of the discharged truckdrivers were not hired by Nielsen, but in our opinion, the order proposed by the Administrative Law Judge will provide an adequate remedy for the unfair labor practices affecting them.

For all of these reasons, we conclude that the Board's order with respect to the remedy provided for the truckdrivers will not properly effectuate the purposes of the National Labor Relations Act and that the order recommended by the Administrative Law Judge should be adopted in lieu thereof.

Conclusion

In summary, it is ordered that the Board's order shall be enforced in all respects, except tha tthe Board's order with respect to the remedy in behalf of the truckdrivers is hereby modified and the order proposed by the Administrative Law Judge[2] is substituted therefor.

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[2] The decision of the Administrative Law Judge is printed in full in the petitioner's appendix at pages 27-81 and his remedy appears on pages 77-79.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JAYS FOODS, INC. and NIELSEN BROTHERS
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition to Review and to set aside an order of the National Labor Relations Board.

PETITION FOR REHEARING

To: *The Honorable Judges Of The United States Court Of Appeals, For The Seventh Circuit:*

Now comes JAYS FOODS, INC., petitioner herein, and pursuant to Rule 40 of the Federal Rules of Appellate Procedure, respectfully petitions this Honorable Court for a rehearing of this cause.

It is apparent from the language of this Court's opinion, dated March 15, 1978, that this Court, from a review of the record before it, was beset by legitimate doubts and findings, inferences and conclusions relative to two major aspects of this case, namely, (1) whether Olson was discharged by Jays because of his alleged union activity, and (2) whether Jays contracted out its cartage operation because of alleged union activity upon the part of its tractor-trailer drivers, viewing the record as a whole, are supported by "substantial evidence"

This is quite evident from this Court's opinion, where the Court was moved to say at page 2 of the published opinion:

> "We find this is a close and difficult case in which there is a great deal of conflicting evidence on many of the crucial questions. If we were deciding the case *de novo,* we might very well have made findings and conclusions contrary to some of the Board's determination."

And again at page 8 of the published opinion where the Court was moved to say::

> "The discharge of Olson presents by far the closest and most difficult question in this case, *so close that it teeters on the balance."* (Emphasis ours)

In coming to its conclusion that the findings, inferences and conclusions of the Administrative Law Judge and the Board are supported by "substantial evidence", this Honorable Court, it is respectfully submitted, has misapprehended and too modestly and narrowly construed the permissible scope of its review and reviewing function as laid down by the Supreme Court of the United States in the leading case of *Universal Camera Corp.* v. *N.L.R.B.,* 340 U.S. 474, 477-492, 71 S.Ct. 456, 95 L.Ed. 456 (1951), and, because of the limited scope of the reviewing function envisioned by it, has given too much deference to and has uncritically accepter at face value findings, inferences and conclusions of the Administrative Law Judge clearly not supported by "substantial evidence" in the record.

It is difficult to comprehend how the Administrative Law Judge's findings, inferences and conclusions that Olson was discharged because of his alleged union activities or sympathies can be deemed to be supported by "substantial evidence" on the record, when in the view of this Court the case is so close "that it teeters on the balance"; particularly in the light of this Court's findings that "Olson was negligent in the discharge of his duties", and the Court's recognition of the fact that there were "justifiable reasons for his dismissal."

It is also difficult to comprehend how the Administrative Law Judge's findings, inferences and conclusion that

Jays contracted out its cartage operation to Nielsen because of the alleged union activities of its tractor-trailer drivers, rather than for valid economic and business reasons, can be deemed to be suported by "substantial evidence" on the record, when it is clear and undisputed from the record that Jays ongoing negotiations with Nielsen, commencing on May 21, 1975 (App. 886-889, 1071-1072), *antedated in its inception and progression* any overt union activities by any of the tractor-trailer drivers, and that valid economic and business reasons, wholly unrelated to the alleged union activities of the tractor-trailer drivers, existed for Jays decision to contract out its cartage operations to Nielsen.

In *Universal Camera Corp.* v. *Labor Board,* 340 U.S. 474, 484-488 (1951), the Supreme Court (by Justice Frankfurter) construed the standard of proof required to support a decision of the Labor Board, and the congressional intent reflected by the Administrative Procedure Act and the Taft-Hartley Act. Said the Court:

> " . . . The committee reports of both houses refer to the practice of agencies to rely upon 'suspicion, surmise, implications, or plainly incredible evidence,' and indicate that courts are to exact higher standards 'in the exercise of their independent judgment' and on consideration of 'the whole record.'"
>
> "Similar dissatisfaction with too restricted application of the 'substantial evidence' test is reflected in the legislative history of the Taft-Hartley Act. The bill as reported to the House provided that the 'findings of the Board as to the facts shall be conclusive unless it is made to appear to the satisfaction of the court either (1) that the findings of fact are against the manifest weight of the evidence, or (2) that the findings of fact are not supported by substantial evidence.' The bill left the House with this provision. Early committee prints in the Senate provided for review by 'weight of the evidence' or 'clearly erroneous' standards. But, as the Senate Committee Reports relate, 'it was finally decided to

> conform the statute to the corresponding section of the Administrative Procedure Act where the substantial evidence test prevails. In order to clarify any ambiguity in that statute, however, the committee inserted the words "questions of fact, if supported by substantial evidence on the record considered as a whole. . . .'"
>
> "This phraseology was adopted by the Senate. The House confrees agreed. They reported to the House: 'It is believed that the provisions of the conference agreement relating to the courts' reviewing power will be adequate to preclude such decisions as those in *N.L.R.B.* v. *Nevada Consol. Copper Corp.* (316 U.S. 105) and in the Wilson, Columbia Products, Union Pacific Stages, Hearst, Republic Aviation, and LeTourneau, etc. cases, supra, without unduly burdening the courts.' The Senate version became the law."
>
> • • •
>
> "Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitively precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record. Committee reports and the adoption in the Administrative Procedure Act of the minority views of the Attorney General's Committee demonstrate that to enjoin such a duty on the reviewing court was one of the important purposes of the movement which eventuated in that enactment."
>
> • • •
>
> ". . . We should fail in our duty to effectuate the will of Congress if we denied recognition to expressed

Congressional disapproval of the finality accorded to Labor Board findings by some decision of this and lower courts, or even of the atmosphere which may have favored those decisions.

"We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."

It is respectfully submitted (to paraphrase *Labor Board* v. *Pittsburgh S.S. Co.*, 337 U.S. 656, 660) that much of the testimony credited by the Administrative Law Judge "carries its own death wound", and much of Petitioner's unrebutted testimony rejected by the Administrative Law Judge "carries its own irrefutable truth." For this Honorable Court, therefore, to give the uncritical deference that it does to the unwarranted findings, inferences and conclusions of the Administrative Law Judge, is not only grossly unfair to the Petitioner, but is inconsistent with the mandate expressed in the *Universal Camera Corp.* case, that the Court of Appeals in reviewing Labor Board cases should not abdicate their reviewing function. For if this Honorable Court believes, as it does, that the Olson

case is so close "that it teeters on the balance", and if this Court were deciding the case de novo "we might very well have made findings and conclusions contrary to some of the Board's determinations", then clearly the evidence adduced on behalf of the Petitioner must carry with it enough of its own "irrefutable truth", and the testimony credited by the Administrative Law Judge carries enough of its own "death wounds", to warrant this Honorable Court concluding that the findings, inferences and conclusions of the Administrative Law Judge are not supported by "substantial evidence" on the record as a whole.

As pointed out in *Torrington Co.* v. *N.L.R.B.*, 506 F. 2d 1042 (C.A. 4th, 1974), the "substantial evidence" test is not satisfied by evidence which merely creates a suspicion, or which amounts to no more than a scintilla, or which gives equal support to inconsistent inferences.

As pointed out in *A. O. Smith Corp.* v. *N.L.R.B.*, 343 F.2d 103 (C.A. 7th, 1965), if the factfinder has credited unsubstantial evidence while disregarding utterly irrefutable evidence, his findings are not supported by substantial evidence.

This Court, in determining from the record considered as a whole whether the Board's findings are supported by substantial evidence, cannot do so without considering contradictory evidence or evidence from which conflicting inferences could be drawn and taking into account whatever in the record fairly detracts from the weight of the evidence supporting the Board's decision. See *N.L.R.B.* v. *Stafford*, 206 F.2d 19 (C.A. 8th, 1953).

A careful review of the record requires more than an uncritical acceptance of the findings of the Administrative Law Judge, and of the inferences drawn therefrom by the Administrative Law Judge and the Labor Board. It should be readily apparent, from an objective review of the record, that the body of evidence in the instant cause opposed to the Board's findings, much of which is uncontroverted, is clearly of such substance, as detailed in Petitioner's briefs filed herein, as to give at least equal

and reasonable support to inferences opposed to the unwarranted inferences drawn by the Administrative Law Judge.

In the Olson case, there is no *direct* evidence that Olson was discharged because of his alleged union sympathies or activities. Such so-called evidence as is credited by the Administrative Law Judge, as a basis for his inference that Olson was discharged because of his alleged union activities or sympathies, is purely of a circumstantial and conjectural nature; and is of such poor quality and probative value, tested against the unrebutted countervailing evidence adduced by the Petitioner, that it would be a miscarriage of justice for the Petitioner to be branded as a law breaker on the basis thereof.

First of all, there is no evidence in the record, direct or indirect, to indicate that the Petitioner (Jays) had any knowledge whatsoever of Olson's activities either in contacting the union or in procuring the signatures of other driver salesmen on union authorization cards. (App. 987-988).

Secondly, the fact that Olson was the union observer at the West Branch in connection with the N.L.R.B. election held on October 2, 1975 would not warrant or justify the Court in drawing any inference that Olson was discharged because of his alleged union activities or sympathies; particularly where, as here, (a) the record indicates that none of the other union observers at the other three (3) branches were discharged; (b) that none of the union observers at a prior election involving the driver salesmen in 1973 were discharged; (c) that Almasi, the driver saleman who replaced Olson on Route C13, was one of those who signed a union authorization card for Olson; (d) that none of the 18 driver salesmen from the West Side Branch, who signed union authorization cards for Olson, were discharged; and (e) that neither William Judges (the driver salesman of Route CO-2) or Ray Almasi (who substituted on Route CO-9 for Judges on November 28, 1975), both of whom had signed union authorization cards, were discharged (App. 582-584, 745-747, 849-850, 987-989).

That Olson was not "singled out" by Brand (the Branch Manager) on Saturday morning, November 29, 1975, when he (Brand) and Skafgaard (the Assistant Branch Manager) personally checked out seven (7) stores, for which no sales were shown on the Friday "route hard cards" for November 28, 1975, is clear from the record. See pp. 28 of Petitioner's original Brief, and pp. 2-3 of Petitioner's Reply Brief filed herein for a detailed discussion thereof.

It is to be noted that the fact that Olson was late in getting to the Jewel store in question on Friday, and was therefore unable to service said store on that date, is not the gravaman of Olson's conduct that precipitated his discharge. The gravaman was the fact that Olson, in clear violation of Company policy, did not come in on Saturday, the next day, to service the Jewel and National stores that he had failed to take care of on Friday. This in face of the fact that some seven (7) other driver-salesmen of the West Branch had come in that Saturday to complete servicing their routes because of the intervening Thanksgiving Holiday the preceding Thursday. Added to Olson's demonstrated lackadaisical attitude and minimum of effort approach to promoting the sale of Jay's products, the Branch Manager (Brand), who had repeatedly remonstrated with Olson concerning Olson's poor sales record, recommended Olson's discharge. All this, it should be noted, took place approximately two (2) months *after* the Union election of October 2, 1975. In the two month interval between that election and the incident which precipitated Olson's discharge, there is no credible evidence to indicate that the Petitioner was in anyway trying to "set-up" Olson as an excuse or pretext to fire him.

The finding of the Administrative Law Judge that Jays' executive vice president, Silas Marttila, ordered the newly appointed West Branch Assistant Manager, Donald Skafgaard, to follow Olson on his route because Olson was pro-union, a wholly unwarranted finding uncritically ac-

cepted by this Court in its opinion, is predicated on wholly uncorroborated hearsay testimony of the rankest sort in no way supported by "substantial evidence." This finding is predicated on Lull's wholly uncorroborated testimony (denied by Skafgaard) in relation to an alleged conversation that he allegedly had with Skafgaard at a New Year's Eve party held at Dennis Altgeber's home on December 31, 1975, relating to Olson. Lull on cross-examination (App. 367) testified that Skafgaard told him that "He (Skafgaard) had followed him (Olson) home *and caught him at home at 11:00 A.M. in the morning.*" (Em phasis ours)

It is to be noted that *there is no claim or testimony whatsoever* by Olson that he had ever been followed or kept under surveillance by Skafgaard or any anybody else from management, or that Skafgaard had caught him (Olson) at home at 11:00 A.M. in the morning. Skafgaard, who had come over to the West Side Branch from another branch only a few weeks before, specifically denied engaging in any surveillance of Olson (App. 847-848). Certainly common sense dictates that if Skafgaard had caught Olson at home at 11::00 A.M. in the morning, that Skafgaard would have testified to that effect in support of Petitioner's position that Olson was discharged for good cause. There is no such testimony by Skafgaard. The credibility of Lull's uncorroborated hearsay testimony in this regard is also open to question in view of the fact that *it was Lull, and not Skafgaard,* who in connection with this alleged conversation, allegedly volunteered the information that "Olson was pro-union."

It should be evident to this Court that this rankest sort of uncorroborated hearsay testimony by Lull, clearly controverted on the record, cannot reasonably be deemed to be of sufficient probative and corroborative value to warrant drawing any inference that Olson was discharged for his alleged union sympathies and activities.

For the Administrative Law Judge to draw any inference of an unlawful intent upon the part of the Petitioner to discharge Olson because of his alleged union sympathies or activities, from Olson's uncorroborated and disputed testimony that Leonard Japp, Sr., the president of Jays, immediately after the election allegedly approached Olson and extended his hand in a handshake, and in an allegedly unfriendly, insincere tone said, "Thanks a lot, Ed" would be patently ridiculous. That this Honorable Court could possibly give any credence or weight to such far out and unwarranted inference upon the part of the Administrative Law Judge is inconceivable It is to be noted, incidentally, that this alleged incident allegedly took place on October 2, 1975, while Olson was not discharged until two months later on December 1, 1975 (App. 1158, 543).

The Administrative Law Judge has also chosen to draw an inference, that the Petitioner discharged Olson because of his alleged union sympathies or activities, from the facts that Olson had worked for Jays for over 20 years, and the fact that Petitioner elected to discharge Olson rather than suspend him or warn him against any future infractions against company rules. Whether the inference drawn by the Administrative Law Judge is a reasonable one, and whether a reasonable countervailing inference deserving of equal weight can be drawn that Olson's discharge was not unlawfully motivated, but was instead due to Olson's unexplained failure to come in on Saturday to service the two chain stores in question (knowing as he did that he had not serviced the Jewel store on the preceding day, Friday, because he had arrived at the store late), and Petitioner's dissatisfaction with Olson's poor sales record and his lackadaisical attitude and minimum-of-effort approach to promoting the sale of Jays products, is one that must be gauged on the "substantiality" of the record as a whole in supporting one or the other inference. Misguided sympathy for Olson, in spite of his admitted inadequacies of his job performance, because he had lost his job is not the test. He was not left bereft, since his

vested rights of some 15 or 16 years of participation in the Petitioner's Profit Sharing and Pension Plans still accrued to him upon severance of his employment. Absent meaningful other or corroborative "substantial evidence" on the record as a whole, of which there is none in the instant cause, that Olson was discharged by the Petitioner because of his union activities or sympathies, no inference of any unlawful motive upon the part of the Petitioner can properly be drawn by the Labor Board by reason of Petitioner's decision to terminate Olson's employment, rather than suspend or otherwise discipline him. See *N.L.R.B.* v. *Garner Tool and Die Manufacturing, Inc.*, 493 F.2d 263, 267-268 (C.A. 8, 1974); *N.L.R.B.* v. *United Parcel Service, Inc.*, 317 F.2d 912, 914 (C.A. 1st, 1963); and *N.L.R.B.* v. *Billen Shoe Co.*, 297 F.2d 801, 803 (C.A. 1st, 1968), cited in detail at pages 12-16 of Petitioner's original brief herein.

The case of *N.L.R.B.* v. *Tom Wood Pontiac, Inc.*, 447 F.2d 383, 386 (C.A. 7, 1971), cited by this Court in its opinion, can clearly be distinguished on the facts from the Olson case, and furnishes no real basis for comparison to the Olson case, as this Court on further analysis must readily admit.

In the *Tom Wood Pontiac* case, supra, the aggrieved employee, one day after the Union's election victory, was formally reprimanded for low productivity, tardiness, and participation in "group bull sessions during working hours." Two weeks later he was reprimanded by the shop foreman for being nine minutes late. Two weeks after that he was discharged, allegedly on the basis of his work as a bumper man being eliminated, even though the company thereafter continued doing bumper work. The evidence also indicated that the Company knew that the employee was a "main man" in the Union, and that the Company had interrogated him prior to the election. Clearly under the circumstances of that case, the Board could and did find that there was substantial evidence on the record as a whole to conclude that the reprimand and his

discharge on the basis of his job being eliminated were pretexts to hide the motive for firing the employee because of his union activities.

In the Olson case, there is no evidence of any interrogation of Olson by the Petitioner. His discharge took place two months after the Union election, and for reasons that were supported by substantial evidence, viz. his failure to properly service two of his chain store accounts, added to his past history of poor sales performance; rather than a contrived situation or pretext set up by the Company as in the *Tom Wood Pontiac case,* supra. There is no real comparison between the two cases.

The uncritical acceptance by this Honorable Court of the unwarranted findings, inferences and conclusions of the Administrative Law Judge does a grave injustice to the Petitioner, and negates the function of judicial review by Courts of Appeal contemplated and mandated by the *Universal Camera Corp. case,* supra. It is inconceivable how a case that "teeters in the balance" can be held to be supported by "substantial evidence." It deserves careful reconsideration and re-evaluation by this Honorable Court.

Relative To The Termination Of Jays' Cartage Operation, And Contracting Same Out To Nielsen Bros. Cartage Co.

As pointed out in detail in Petitioner's original briefs, here again the findings of the Administrative Law Judge repeatedly distort the record by reading into it, by unwarranted inference after unwarranted inference, particularly where the counteravailing evidence adduced by the Petitioner is uncontroverted, his own colored interpretation of that evidence and his own value judgment of what management should or should not have done in deciding to contract out the Jays cartage operation.

To uncritically accept a face value all the minutiae, bits and pieces, findings and inferences of the Administrative

Law Judge, is to ignore and fail to give due weight to the substantial countervailing evidence adduced by the Petitioner on this issue in support of its position that there were valid, bona fide economic and business reasons for Jays to "contract out" its cartage operations to a professional cartage firm.

It is difficult to comprehend how the Administrative Law Judge's findings, inferences and conclusion that Jays contracted out its cartage operation to Nielsen because of the alleged union activities of its tractor-trailer drivers, rather than for valid economic and business reasons, can be deemed to be supported by "substantial evidence" on the record, when it is clear and undisputed from the record that Jays ongoing negotiations with Nielsen, commencing on May 21, 1975 (App. 886-889, 1071-1072), *antedated in its inception and progression* any overt union activities by any of the tractor-trailer drivers, and that valid economic and business reasons, wholly unrelated to the alleged union activities of the tractor-trailer drivers, existed for Jays decision to contract out its cartage operations to Nielsen.

There is no indication of any overt union activities by any of said drivers until mid-September, 1975, when McCormick, one of the drivers, advised Lull, another one of the drivers, that he (McCormick) had contacted Teamsters Local No. 705 and had set up a meeting at the union hall for September 26th; a meeting which was attended by six of the drivers, and at which it was agreed to call a general meeting of the drivers with the Union on Saturday morning, October 4th at a motel in Calumet City. (App. 295-303, 258-261).

The record shows that the union officials from Teamsters Local No. 705 were well aware of the problems that the Chicago Truck Drivers Union had previously had with the Jays' tractor-trailer drivers, in having a contract negotiated by the union repudiated by the Jays' drivers (App. 390, 470), and that none of the officials from Teamsters Local No. 705 showed up at that meeting (App. 316-318,

473). Thereafter, there were no overt union activities or meetings involving the tractor-trailer drivers (except for a conversation had between Siebert and Lull, two of the drivers, and Fred Boudreau and Pete Andronus of the Chicago Truck Drivers' Union in the middle of October, 1975, when Lull asked these union officials to "nosy" around a little to find out whether Jays was going to dispose of cartage operation) (App. 320-324).

The record is clear that before any overt union activities outlined above occurred, that negotiations between Jays and Nielsen had progressed to a point where (i) Nielsen, on or about September 2nd or 3rd had personally checked out Jays' cartage operations, and had inspected the log books of the Jays' drivers (App. 890-891, 1073-1074); (ii) that Nielsen, on or about Sept. 8th or 9th had submitted a worksheet calculation (Respondent's Exhibit No. 11) to Jays reflecting what it would have cost Jays to have had Nielsen handle Jays' cartage operations for a sample week (App. 1074-1075, 891-893), and had met with Mr. Stanislawski, of Jays, and had worked for a formula to purchase Jays' automotive equipment if the cartage operations were contracted out to Nielsen (App. 903-905, 1041-1044, 1075-1077). By Oct. 9th, the proposed agreement between Jays and Nielsen was firmly crystallized and agreed to, subject to contract formalization and ICC issuance of a certificate of contract authority to Nielsen to haul Jays' products (App. 956-963, 1084-1089).

When all is said and done, it is this time sequence of events, and not the disputed minutiae and bits and pieces credited by the Administrative Law Judge which purport to support a decision unfavorable to the employer, which should be the yardstick by which Petitioner's real motive for contracting out its cartage operations should be fairly measured.

CONCLUSION

Wherefore, Petitioner respectfully prays that its Petition for Rehearing herein be granted, and that this cause be restored to the calendar for reargument or resubmission or for such other disposition as this Court deems appropriate.

Respectfully submitted,

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312-679-6100
Attorneys for Petitioners herein
(Respondents below),
Jay Foods, Inc., and Nielsen Brothers Cartage Co., Inc.

BERNARD M. KAPLAN
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Of Counsel.

APPENDIX C

IN THE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Thursday, April 6, 1978

Before

Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. WILSON COWEN, *Senior Judge*•
Hon. HARLINGTON WOOD, JR., *Circuit Judge*

JAYS FOODS, INC. and NIELSEN BROTHERS CARTAGE CO., INC.,
Petitioners,

No. 77-1326

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition to Review and to set aside an order of the National Labor Relations Board.

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause, all of the members of the panel having voted to deny a rehearing.

It Is Ordered that the petition for rehearing in the above-entitled cause be, and the same is hereby, Denied.

• Senior Judge Wilson Cowen of the United States Court of Claims is sitting by designation.

APPENDIX D

(Filed May 23, 1978)

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

JAYS FOODS, INC., and NIELSEN BROTHERS CARTAGE CO., INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 77-1326

JUDGMENT

Before: Sprecher, Circuit Judge, Cowen*, Senior Judge and Wood, Circuit Judge.

This Cause came on to be heard upon a petition filed by Jays Foods, Inc., to review an order of the National Labor Relations Board issued against said Petitioner, Chicago, Illinois, its officers, agents, successors and assigns on February 24, 1977, and upon the cross-application of the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on October 28, 1977, and on March 15, 1978, handed down its decision granting enforcement of the Board's order, as modified. In conformity therewith, it is hereby

Ordered And Adjudged by the Court that Jays Foods, Inc., Chicago, Illinois, its officers, agents, successors and assigns, shall:

* Senior Judge Wilson Cowen of the United States Court of Claims is sitting by designation.

1. Cease and desist from:

(a) Discouraging membership in or activities on behald of Local 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or Retail Clerks Union Local 1550, affiliated with Retail Clerks International Association, AFL-CIO, or any other labor organization, by discharging its employees or in any other manner discriminating in regard to their hire or tenure of employment, or any term of condition of their employment.

(b) Granting, or promising to grant wage increases, or other benefits in order to induce its employees to refrain from union activities.

(c) Threatening to withhold wage increases or other benefits to induce its employees to refrain from union activities.

(d) Threatening to terminate its operations, or any part of its operations, or to sell its equipment because its employees have become members of a union or have engaged in activities on behalf of a union.

(e) Coercively interrogating its employees concerning membership in or activities on behalf of a union.

(f) In any other manner interfering with, restraining or coercing employees in the exercise of rights guaranteed under Section 7 of the National Labor Relations Act, (hereinafter called the Act).

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Edward Olsen immediate and full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent job, and make him whole for any loss of earnings he may have suffered by reasons of his discharge, in accordance with the provisions of the paragraph numbered I of the section entitled "The Remedy".

(b) In the event Respondent Jays Foods, Inc., resumes its delivery operations which were contracted to Nielsen Brothers Cartage, Inc., on or about November 17, 1975, or withdraws such delivery operations from Nielsen Cartage, offer the employees named below immediate and full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent jobs, in accordance with the provisions of the paragraph numbered II of the section entitled "The Remedy".

(c) Make the employees named below whole for any loss of earnings or benefits they may have lost by reason of their discharge on November 14, 1975, to the date Respondent Jay Foods, Inc., offers them reinstatement, or until such earlier time as each secures, or did secure, substantially equivalent employment, in accordance with the provisions of paragraph II of the section entitled "The Remedy".

Siebert Kuiken	James Paluch	Dennis Altgibers
Richard McCormick	Robert Vitner	Edward Sallay
Jack Whelan	Gary Redelsperger	Craig Mullins
Paul Knott	Charles Vogel	Lawrence Rossi
Albert Philp	John Short	David Butkus
Robert Lull	Gerald Dildine	Raymond Hansen
Henry Goodman	Charles Merrick	Lauren Hodson
Thomas Richards	Raymond Prince	Ronald Davis
Charles Dietz	James Chapman	

(d) Preserve, and upon request, make available to the Board and its agents for examinations and copying all payroll records, social security payment records, timecards, personnel records and reports and all other records necessary to facilitate the effectuation of the Judgment herein.

(e) Post at its plant and branch operations in and about Chicago, Illinois, copies of the attached notice marked "Appendix." Copies of said notice, on form provided by the Regional Director for Region 13, (Chicago, Illinois), after being duly signed by an authorized representative of Respondent, shall be posted by it im-

mediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the aforesaid Regional Director in writing, within 20 days from the date of this Judgment, what steps Respondent has taken to comply herewith.

/s/ Robert A. Sprecher
Judge, United States Court
of Appeals for the Seventh
Circuit

APPENDIX E

228 NLRB No. 54

UNITED STATES OF AMERICA
Before The National Labor Relations Board

JAYS FOODS, INC.
and Case 13-CA-14889
ROBERT LULL, an Individual
and Case 13-CA-14955
RETAIL CLERKS UNION LOCAL 1550,
AFFILIATED WITH RETAIL CLERKS
INTERNATIONAL ASSOCIATION, AFL-CIO
NIELSEN BROTHERS CARTAGE CO., INC.
and Case 13-CA-14890
ROBERT LULL, an Individual

Decision and Order of the National Labor Relations Board, issued February 24, 1977, which read as follows:

DECISION AND ORDER

On September 3, 1976, Administrative Law Judge Sidney J. Barban issued the attached Decision in this proceeding. Thereafter, Respondents, Jays Foods, Inc., and Nielsen Brothers Cartage Co., Inc., filed exceptions and a brief, and the General Counsel filed exceptions and a brief. The Respondents and the General Counsel filed answering briefs ot the respective exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has

decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order as modified herein.

We agree with the findings of the Administrative Law Judge that when Respondent Jays Food contracted out its delivery operation on November 14, 1975, to Nielsen Brothers Cartage, Company, Inc., and discharged its truckdrivers, it did so for discriminatory reasons in violation of Section 8(a)(1) and (3) of the Act. However, we do not agree with the Administrative Law Judge's recommended remedy for such conduct, which does not require Respondent Jays Foods to resume its delivery operations and to offer reinstatement to the 26 discriminatees.

As the Administrative Law Judge correctly points out, the remedy of resumption of operations is the normal remedy in the factual situation here, particularly since the record shows that such a resumption of operations would not create any undue hardship.

Respondent Jays Foods is a successful and financially sound operation and had conducted its own delivery operations for over 30 years. Although Jays Foods has contracted out this work to Nielsen, the delivery trucks and other equipment continue to be housed on Jays Foods' property and, in fact, the trucks still have Jays Foods' name on them. The truckdrivers, now employed by Nielsen, report to Jay Foods' premises, the same as before the contracting out. There they are dispatched

[1] Respondents Jay Foods has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

daily by a dispatcher employed by Nielsen from an office in Jay Foods plant.

Under the provisions of the contract between Jays Foods and Nielsen, the agreement can be cancelled upon 30 days' notice in writing by either party, and Jays Foods has the right to repurchase the vehicles at a certain time period in accordance with the conditions set forth in the contract. Thus the physical and legal ties of the delivery service operations have not been completely severed, and Jays Foods' resumption of the delivery operation at any time could be easily effected.

Apparently, the reason the Administrative Law Judge did not consider it necessary to order Jays Foods to resume the delivery operations is that he considered the *status quo* as providing a substantially adequate affirmative remedy for the unfair labor practices. He indicated he was strongly influenced by the fact that Nielsen had eventually voluntarily hired 23 of the 26 discharged employees to perform Jays Foods' delivery operation in apparently the same manner as before. He also was persuaded by the fact that the wages and other benefits of the drivers may be better than those enjoyed before Jays Foods contracted out the operation. We find the rationale of the Administrative Law Judge unconvincing and legally unsupportable under the facts of this case.[2]

Admittedly, the discriminatees are paid a higher hourly rate working for Nielsen. However, part of the higher wage scale can be attributed to normal raises which were periodically given, and it is pure speculation to assume, as does the Administrative Law Judge, that the truck-

[2] Cf., e.g., *Walker Company,* 183 NLRB 1322 (1970); *Bruce E. Kronenbergh and Herbert Schoenbrod d/b/a American Needle & Novelty Company,* 206 NLRB 534 (1973); *Akron Novelty Manufacturing Company,* 224 NLRB No. 110 (1976); *Serv-U-Stores, Inc.,* 225 NLRB No. 7 (1976); *Sunflower Novelty Bags, Inc.,* 225 NLRB No. 193 (1976).

drivers would not have received similar raises, or that they would receive pay cuts if they returned to work for Jays Foods. Moreover, the records shows that the discriminates received monetary benefits at Jays Foods which they do not enjoy at Nielsen, such as substantial yearly bonuses and free meals and coffee. Furthermore, as the Administrative Law Judge specifically noted, the seniority and job security at Nielsen, where they are now employees with low seniority, may not compare with that enjoyed at Jays Foods.

Our concern also is that the remedy recommended by the Administrative Law Judge permits Respondent Jays Foods to be rewarded for its illegal activity. The organizational efforts of its employees have been effectively frustrated and Jays Foods has succeeded in avoiding union organization. We find that the payment of the modest amount of backpay required and the posting of the notices recommended by the Administrative Law Judge are insufficient remedies to effectuate the policies of the Act.

In brief, the remedy recommended by the Administrative Law Judge falls short of making the discriminates whole. The record shows that three truckdrivers who had been discriminatorily discharged have not been hired by Nielsen. In accepting a job with Nielsen the other discriminatees are required under the union security of the collective-bargaining contract to join a union not of their own choosing. Indeed, they must join a union which the majority of the employees in the Jays Foods' unit had earlier rejected.

For the above reasons we shall require Respondent Jays Foods to resume its former operations and reestablish the *status quo ante,* to the extent necessary to provide jobs for those who desire reinstatement in Jays Foods' employment as provided below.

Addtional Remedy

Having found that Respondent Jays Foods has engaged in certain unfair labor practices, we shall order it to cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act as recommended by the Administrative Law Judge in the Remedy provided for in his Decision.

For the reasons discussed above, however, we have found that the Administrative Law Judge's refusal to require Respondent Jays Foods to resume its delivery operations would not effectuate the policies of the Act. Accordingly, we shall order that Respondent Jays Foods reestablish that operation and reinstate the employees discriminatorily discharged when the the delivery work was contracted out. We shall also award the employees involved backpay based on the earnings they normally would have received from the date of their discharge to the date of Respondent Jays Foods' offer of reinstatement, less any net interim earnings, which shall be computed on a quarterly basis, in the manner set forth in *F. W. Woolworth Company,* 90 NLRB 289 (1950), with interest at the rate of 6 per cent per annum as set forth in *Isis Plumbing & Heating Co.,* 138 NLRB 716 (1962).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge as modified herein and hereby orders that the Respondent, Jays Foods, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order as so modified:

I. Substitute the following for paragraph 2(b):

"b) Reestablish its delivery operations and offer to the following employees immediate and full reinstatement to their former jobs or, if those jobs no longer exist,

to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make each of them whole for any loss of earnings they may have suffered in the manner provided in the Section of the Board's Decision and Order entitled 'Additional Remedy':

"Siebert Kuiken	Gerald Dildine
Richard McCormick	Charles Merrick
Jack Whelan	Raymond Prince
Paul Knott	James Chapman
Albert Philp	Dennis Altgilbers
Robert Lull	Edward Sallay
Henry Goodman	Craig Mullins
Thomas Richards	Lawrence Rossi
Charles Dietz	David Butkus
James Paluch	Raymond Hansen
Robert Vitner	Lauren Hodson
Gary Redelsperger	Ronald Davis
Charles Vogel	John Short"

2. Delete paragraph 2(c) and reletter the following paragraphs accordingly.

3. Substitute the attached notice for that of the Administrative Law Judge. Dated, Washington, D.C. February 24, 1977

.....
Betty Southard Murphy, Chairman

.....
John H. Fanning, Member

.....
Howard Jenkins, Jr., Member
National Labor Relations Board

(Seal)

APPENDIX F

UNITED STATES OF AMERICA
Before The National Labor Relations Board
Thirteenth Region

JAYS FOODS, INC.,
Respondent,
and Case No. 13-CA-14889
ROBERT LULL,
Charging Party.
NIELSEN BROTHERS CARTAGE CO., INC.,
Respondent,
and Case No. 13-CA-14890
ROBERT LULL,
Charging Party.
JAYS FOODS, INC.,
Respondent,
and Case No. 13-CA-14955
RETAIL CLERKS UNION LOCAL 1550, Affiliated with RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO,
Charging Party.

Decision of Administrative Law Judge Sidney J. Barban, issued on September 3, 1976, which reads as follows:

Statement of the Case

Sidney J. Barban, Administrative Law Judge: This matter was heard at Chicago, Illinois, on April 26, 27, 28, 29, 30 and May 4, 5, 6, 1976, upon complaints issued in the above cases consolidated by an order issued on

January 27, 1976.[1] The consolidated complaints allege that (A) Respondent Jays Foods, Inc. (herein sometimes "Jays") interrogated employees concerning union activities; granted a wage increase to induce employees to refrain from union activities; threated to withhold a wage increase from employees engaging in union activities; advised employees that management of Jays was angry and would sell its trucks and contract out its delivery operations because employees had engaged in union activities; and stated that employees would lose benefits if a union were selected as their representative, all in violation of Section 8(a)(1) of the Act; and that (B) Respondent Jays, on or about November 14, 1975, ceased its delivery operations, sold its trucks and contracted its delivery operations to Respondent Nielsen Brothers Cartage Co., Inc. (herein sometimes "Nielsen Cartage"), and discharged 26 named employees, because its employees had engaged in union activities, all in violation of Sections 8(a)(1) and (3) of the Act; and that (C) Respondent Nielsen Cartage refused to hire five named employees (who had been discharged by Jays) because they had engaged in union activities, in violation of Sections 8(a)(1) and (3) of the Act; that (D) Nielsen Cartage is and has been a successor employer with respect to the delivery operations of Jays, and at all material times had knowledge of Jays' alleged unfair labor practices in ceasing its delivery operations, selling its trucks and contracting its delivery operations to Nielsen Cartage and discharging its employees; and that (E) Jays, on or about December 1, 1975, discharged Edward Olsen because of his union or other protected concerted activities in violation of Sections 8(a)(1) and (3) of the Act.

The answers of Jays and Nielsen Cartage (sometimes jointly referred to as "the Respondents") deny the com-

[1] Charges in Cases Nos. 13-CA-14889 and 13-CA-14890 were filed on November 19, 1975, and charges in 13-CA-14995 on December 9, 1975. A consolidated complaint in 13-CA-14889 and 13-CA-14890 issued on January 22, 1976. Complaint in 13-CA-14955 issued on January 26, 1976.

mission of the alleged unfair labor practices, but admit allegations in the complaints sufficient to justify the assertion of jurisdiction over Respondents under current standards of the Board (Jays produced and distributed snack foods in a recent annual period of a value in excess of $50,000 which it shipped in interstate commerce; Nielsen, engaged in the trucking and delivery business, an essential link in the chain of interstate commerce, in a recent annual period, performed services valued in excess of $50,000 for enterprises which shipped goods valued in excess of $50,000 directly in interestate commerce). Respondent's answers admit that Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) (herein "the Independent Union"),[2] and Local 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein "the Teamsters"), and Retail Clerks Union Local 1550, affiliated with Retail Clerks International Association, AFL-CIO (herein "the Retail Clerks"), are labor organizations within the meaning of the Act.

Upon the entire record in this case[3] from observation of the witnesses and their demeanor, and after due consideration of the briefs filed by General Counsel, Jays and Nielsen, I make the following:

Findings and Conclusions

A. *Jays' Operations*

1. *Descriptions* Jays asserts that it is the largest independent snack food producer and distributor in the United States with annual gross sales in excess of $30,-

[2] Sometimes referred to as "Fenner's Union" in the transcript in reference to the Executive Director of the Independent Union.

[3] General Counsel's motion to correct the record by deleting the word "liar" at page 1262, line 18, and inserting the word "lawyer" in its place, which is unopposed, is hereby granted.

000,000 (Resp. Exh. 10). This operation which began, apparently in a small way, in 1938, acquired its first tractor-trailer in 1942 or 1943. At times material to this proceeding in 1975 (all dates herein are in 1975 unless otherwise noted), Jays operated a manufacturing plant in Chicago, Illinois, at which it produced or processed certain snack foods. These products are distributed to certain distribution points in Chicago (and perhaps elsewhere) operated by Jays, which are referred to herein as "branches," and to independent distributors located in four states. To make deliveries from its plant to its branches and distributors, and among branches and distributors, (referred to herein as "delivery operations") Jays had acquired and owned 27 tractors and 35 trailers and leased two additional tractors. These were located at Jays' plant out of which the truckdrivers employed by Jays in its delivery operation were dispatched.[4] At the time Jays sold this equipment and contracted out its delivery operations, it also had three additional trailers on order which had not then been delivered. Immediately prior to November 17, when Jays contracted out its delivery operations, it employed 26 truckdrivers in this operation.

Jays also employs driver-salesmen at various branches who take Jays' products from the branches and deliver them to various grocery stores and other retail outlets on the routes assigned to each individual driver. As is customary in this type of industry, the driver-salesmen are expected to be on the lookout for new accounts in their area and to aggressively push their employer's products.

Other operations of Jays not directly involved in this proceeding are not detailed in the record.

[4] The term "truckdrivers" or "drivers" will be used to refer to employees engaged in Jays' delivery operations to drive tractor-trailer equipment, in contradistinction to Jays' "driver-salesmen," who deliver its products to retail outlets.

2. *Managerial and supervisory personnel*: Principally involved in this proceeding are the following:

Leonard Japp, Sr., is president of Jays and clearly controls its day-to-day operations.

Silas Martilla is Executive Vice President for Marketing of Jays and is in charge of Jays' sales activities, and prior to November 17, had responsibility for the delivery operations described above.

John Staton, whose status is at issue in this proceeding, is either the shipping supervisor, as he described himself in his prehearing affidavit to the General Counsel, or the assistant shipping supervisor, as he insisted in his testimony. The title is not important here. In his affidavit, Staton states that he has authority to hire and fire dock employees who work at Jays' plant, which employees apparently, as normal in the industry, load and unload trucks and handle merchandise on the docks at Jays' plant. At the hearing, Staton testified that he has authority to fire dock employees, but only makes recommendations as to their hire, some of which are not followed.[5] I am satisfied from observation of the witnesses and from the record as a whole (e.g., Staton's presence with management at meetings concerned with truckdrivers' working conditions), that Staton's authority is greater than Jays' witnesses admit. In any event, since he exercises one authority—the right to fire—set forth in the statutory definition, he is clearly a supervisor within the meaning of the Act, and I so find.

Arthur L. Timmons, Sr., whose status is also in dispute, carries the title of Assistant to the Sales Manager, Special Projects. It is stated that Timmons is assistant to Martilla and Leonard Japp, Jr., but the record indicates that he principally reports to the former. Timmons

[5] At one point Staton testified that he did not have authority to recommend discharge. To the extent that this is inconsistent with his prior testimony that he has the right to discharge employees, Staton's denial is not credited.

is a son-in-law of Japp Sr., and though he does not himself own stock in Jays, nor is he an officer of the corporation, his wife owns a substantial amount of such stock and is a member of the Board of Directors of Jays. One of Timmons' functions is to visit consumers who have purchased Jays' products and have made a complaint. He discusses the customer's complaint, attempts to explain the situation and appease the complainant. He may offer the customer fresh product for product complained of. Timmons' reports of products complained of are brought to production supervisors for corrective action. Timmons represents Jays at openings of new stores of chain grocery firms, arranging for the display of Jays products. When Jays contemplates expanding into a new territory, Timmons would investigate the area and may talk to grocery managers in that area on behalf of Jays. He makes a report on this investigation to Martilla. He has some responsibility with respect to overdue accounts of some chain stores supplied by Jays, although his testimony concerning this function tended to be somewhat evasive to the point of being facetious. In the absence of either the manager or the assistant manager of one of Jays' branches, Timmons will fill in for the absent manager, sometimes for several weeks, but it is denied that he exercises the supervisory authority which admittedly the manager and the assistant manager possess. On occasion, Timmons has been assigned to ride with Jays' truckdrivers and do a time study of their work. In this function, Timmons has given truckdrivers road tests and written examinations required by government regulations and certified to these facts as an authorized representative of Jays. Timmons testified that he also has gone out on a route to substitute for an absent driver-salesman. Timmons is paid on a salary basis, and receives in addition a commission based on Jays' gross volume of sales. Martilla and Japp, Jr., are the only other individuals receiving such commission. Based on his income during a recent period, it would seem that Timmons' income from Jays will substantially exceed $30,000 annually.

The facts set forth and the record herein demonstrates that Timmons is identified with and is part of the management of Jays. In the circumstances of this case, the employees would reasonably understand that Timmons spoke for Jays in matters affecting their employment. Considering all of the factors involved—particularly Timmons' close relationship to the owners of the business, his authority to represent Jays in dealings with the public, his frequent substitution for admitted supervisors (it was not shown that employees were informed that he had, as claimed, less authority than the absent manager) and his testing, examining and certification of Jays' truckdrivers as qualified to be employed—in light of the provisions of Sections 2(13) and (2) of the Act, I find that Arthur L. Timmons, Sr., is an agent of Jays within the meaning of the Act, and that Timmons' conduct, as set forth hereinafter, is attributable to Respondent for the purposes of the Act. See *Aircraft Plating Co.*, 213 NLRB 664.

As noted above, it is admitted that the managers and assistant managers of Jays' various branches are supervisors within the meaning of the Act. At times material to this proceeding, William Brand was manager and Donald C. Skafgaard, Jr., was assistant manager of Jays' West Branch where Edward Olson was employed at the time of his discharge.

B. *Background and Summary of Facts*

There have been several attempts to organize different parts of Jays' operations, some of which resulted in proceedings before the Board. The earliest of these brought to my attention is reported in 129 NLRB 690. In that instance, in June 1959, a local of the International Association of Machinists sought to represent the maintenance workers employed by Jays to maintain approximately 115 vehicles used in the delivery of its products. Jays opposed the organization attempt, but in an election on July 21, 1959, the employees voted for the IAM by an overwhelming majority. Prior to certification, the IAM presented

Jays with a contract which it had with another area employer. Determining that the rates in the IAM contract were higher than those it was then paying to its maintenance employees, Jays' maintenance supervisor Judkins (apparently the same maintenance supervisor described in the present record) was instructed to contract out the maintenance operations. A final decision was made to close the maintenance department on July 30, 9 days after the election and the maintenance employees were discharged on July 31. The Board found that the maintenance employees were discharged because they had sought to exercise their right to collective bargaining guaranteed by the Act and that Jays had thereby violated Sections 8(a)(1) and (3).[6] The Court of Appeals for the 7th Circuit set aside the Board's Decision and Order, 291 F.2d 317.

For some time Jays also seems to have had considerable dispute and litigation with Local 1 of the Bakery Workers. See 148 NLRB 310 (sustaining union objections to election); 57 LRRM 2495 (C.A. 1) (dismissing Jays' petition for review of Board's order directing an election) cert. den. 379 U.S. 969; 255 F. Supp. 822 (involving a state court suit against the bakers union).

In 1973, the Independent Union (also called Fenner's Union) won an election conducted by the Board and was certified as the bargaining representative of Jays' truckdrivers. Jays' Vice President Martilla testified that Jays and the Independent Union came to an agreement on the terms of a bargaining contract. It appears that the Inde-

[6] In coming to this conclusion the Board and the Trial Examiner (now Administrative Law Judge) discredited Jays' contention that it had long considered contracting out its maintenance operations. It is also noted (as discussed further hereinafter) that the Trial Examiner in that case placed some emphasis on the fact that prior to contracting out its maintenance work, Jays did not make a comparative cost study and offered no proof that the contracting out had actually been economic.

pendent Union then advised the drivers that if they did not accept this agreement, the union would no longer represent them. When the drivers rejected the contract proposal, the Union on February 13, 1974, advised the employees that the Union would no longer negotiate for them and withdrew as the employees' collective-bargaining representative. Jays then requested the Regional Office of the Board to revoke the certification of the Independent Union and on March 18, 1974, the certification was revoked. Jays, however, assured the drivers that it would pay the various raises which had been agreed with the Independent Union.

In 1975, Jays' employees became involved in two union organizational attempts. In July, the Retail Clerks filed a petition to represent the company's driver-salesmen. The Retail Clerks lost the election on October 2, 1975. Meanwhile, a group of Jays' truckdrivers, on September 26, upset at the results of the company's request that they forego the wage raise promised for July 1, sought the assistance of the Teamsters. A further meeting between the Teamsters and the truckdrivers was set for October 4. However, on October 3, Jays suddenly announced to the truckdrivers that the wage raise they had been asked previously to forego until the first of the year would be granted immediately.

Moreover, as discussed in more detail hereinafter, just 2 days before granting this raise to the truckdrivers (and 1 day before the Retail Clerks election), Jays asserts that it informed Adolph J. Nielsen, president of Nielsen Cartage that Jays would contract out to Nielsen the delivery operations in which the truckdrivers were then employed. The truckdrivers were notified of this on November 14 and Nielsen Cartage took over Jays' delivery operations on November 17, employing some, but not all of Jays' truckdrivers.

Edward Olsen, who had been one of the observers for the Retail Clerks at the election on October 2 was discharged on December 1.

Case No. 13-CA-14889

Case No. 13-CA-14889 essentially involves the charge that Jays discontinued its delivery operations, sold its trucks, contracted out its delivery operations, and discharged its truckdrivers engaged in those operations because of the drivers' activities in respect to the Teamsters and that Jays engaged in certain independent violations of the Act.

1. Union activity

About the last of June 1975, Jays called a meeting of its truckdrivers in the late afternoon at the plant. Martilla, Staton, Joe Whalen (vice president in charge of advertising and a son-in-law of Japp, Sr.) and Judkins were present for management. Martilla advised the employees that because of certain economic strictures which the company was experiencing, Jays was trying to cut back on expenditures. He referred to the 32 cents per hour raise that would be due the truckdrivers on July 1 under the commitment made to them after the Independent Union withdrew as their representative, and requested their cooperation in agreeing to forego the increase until the first of the following year. After the management personnel had left the room, the truckdrivers, led by Robert Lull, voted to agree with the Company's request and Lull advised Martilla that the truckdrivers would cooperate and the wage increase could be deferred as Martilla had requested.

The truckdrivers, or some of them, thereafter became disillusioned with this decision, based mainly on their discovery that the company had thereafter employed a new production supervisor who they thought was being paid in part with their deferred pay raise. For some time they discussed contacting the Teamsters. Six truckdrivers (Lull, Kuiken, McCormick, Goodman, Paluch and Hodson) finally met with agents of the Teamsters, on September 26, at the Teamsters' hall. All of these signed

authorization cards for the Teamsters. At this meeting the Teamster agents told the employees that the Teamsters would not be interested in becoming involved unless assured that a majority of the truckdrivers desired representation by the Teamsters. It was agreed that the six employees would attempt to have as many of the truckdrivers as possible attend a meeting with Teamster agents on Saturday, October 4. During the succeeding week, this was much talked about among the truckdrivers with the result that almost all the truckdrivers employed by Jays attended the meeting at a local motel. However, for reasons not shown by the record, the Teamster agents did not appear as promised, and did not contact the truckdrivers to explain that they would not come to the meeting.

Knowledge of this activity to secure representation by the Teamsters was soon known to Jays. Thus, when Staton returned from vacation in September, he was told that the truckdrivers were contacting the union. (Staton states that he does not recall who told him this and denies that he knew what union was involved.) Staton thereupon questioned several truckdrivers as to whether the employees had contacted the union, and asked why they would want a union, stating his understanding that the employees had an agreement with Martilla.[7] Staton received only negative responses from the employees to his questions. Staton's conduct is alleged as interrogation violative of the Act. This will be dealt with hereinafter.

2. Alleged interference, restraint and coercion of employees

(a) *The October 3 meeting*

After the close of the representation election on October 2, which was lost by the Retail Clerks, Martilla advised Japp, Sr., that Martilla was going to hold a meeting

[7] This clearly referred to Martilla's promise to abide by the wage provisions of the proposed agreement with the Independent Union.

with the truckdrivers the next evening and intended to advise them that Jays would restore the wage increase which had been deferred since July 1. At the meeting on October 3, attended by Martilla, Staton, Whalen and Judkins on behalf of Jays, Martilla told the truckdrivers that he had intended to have a meeting with them for some time but that he had been too busy. After a few queries on operational matters, according to the credited testimony of truckdriver Robert Lull, Martilla told the employees that the Company's financial condition, as shown by an auditor's report, had so improved that Jays could give the truckdrivers their deferred raise immediately "rather than wait until the first of the year." Lull testified that then Martilla asserted that he had heard that "a few of your fellows have contacted a union," that if he knew who the employees were who were involved in this, he would not give them the raise, but since he did not know, he would have to give the raise to all. Martilla further stated, "I don't know what the hell you fellows want, but if you want a union, why don't you go back to Fenner's union because he got you this [holding up the proposed agreement with the Independent Union], and "you fellows aren't loyal to anyone but yourselves."

This version of the October 3 meeting was substantially supported by the testimony of General Counsel's witnesses James Chapman,[8] Gary Redelsperger, James Paluch and Richard McCormick. In addition, Ronald Davis, a truckdriver who came in at the very end of the meeting, recalled, on cross-examination, that he had heard Mar-

[8] At the hearing, General Counsel offered Chapman's pre-trial affidavit assertedly to rebut an implied charge of recently fabricated testimony inherent in the cross-examination of Chapman. I rejected this offer. General Counsel complains of this in his brief. I have since reconsidered my ruling in light of the discussion of Rule 801(d)(1) in Redden and Saltzburg, *Federal Rules of Evidence Manual* (Michie 1975) and have some question whether my ruling was correct. However, since I credit Chapman the issue is not important.

tilla "say something about why don't you guys try to get Fenner's union back in here."

Martilla's version of this meeting differs from Lull's principally in his denial that he knew about the truckdrivers' union activity at the time and, therefore, did not indicate at the meeting that he knew about their union activity; in his denial that he said that if he knew who was involved in the union activity those employees would not receive the raise; and in his denial that he advised the truckdrivers to go to Fenner's union if they wanted a union. Martilla states he did advise the employees "that it was my opinion that not all of them really deserved [the raise] in view of things that had happened since the first of July but because of the fact that I didn't specifically know who these people were, . . . I would give everyone the 32 cents an hour pay raise," and that this "was living up to the commitment that we had had with them after Fenner's union walked away."[9] Martilla's denials were substantially corroborated by Whalen and Staton. Whalen also recalled that Martilla "said something like, 'I'm not sure that everyone deserves a blanket raise, but that's according to the agreement and we are going to live up to it.' "

I have credited Lull's version of this meeting because he impressed me as an honest, straightforward witness whose testimony was corroborated by other witnesses. Davis' testimony as to the single remark he heard at the end of the meeting, in particular, impressed me as having the ring of truth and accuracy in support of Lull's version. I do not credit Martilla's denial that he was aware of truckdriver union activity. The record as a whole, as

[9] At another point, Martilla testified that he told the men, more specifically, that some did not deserve the raise "because of the kind of work they had been performing" since July 1. He asserted that this comment was based upon a rather vague, unspecific and undocumented statement made by Shipping Supervisor Neal that some of the truckdrivers were "dogging it."

discussed herein, convinces me that Respondent was well aware of this activity. Staton's admissions have been referred to previously.

Respondent gives no convincing reason for announcing this raise on the day before the men were scheduled to meet with the Teamsters. The men understood that the raises had been deferred to January. The timing of this action, Martilla's antiunion comments at the meeting, and remarks made by Japp, Sr., after the meeting, as discussed below, in light of the entire record, are convincing and I find that the grant of the wage raise was to counteract the truckdrivers' union activities. I further find that Martilla's statement that he would not give the raise to those active in union activities, if he knew them, contained an implied threat of reprisal for those who continued in such union activity. By such conduct Respondent interfered with, restrained and coerced its employees in violation of Section 8(a)(1) of the Act.

(b) *Aftermath of the October 3 meeting*

(1) Immediately after the meeting and on their way out, truckdrivers Ronald Davis and Charles Dietz went into the dispatch office. Davis states that while they were there, Japp, Sr., came into the office and spoke to them. According to Davis, Japp said he hoped that the men were happy with the 32 cents raise which they had received. Japp further said that he heard that the men were "going to have a meeting tomorrow," and, in answer to Davis' affirmative reply, then asked if Davis and Dietz were going to the meeting. Davis indicated that this depended on his wife's plans for him, and that Dietz replied that he did not think he could attend. Japp expressed his disapproval of their attending the meeting and stated that he knew who the troublemakers were who were trying to get the union in—Lull, Goodman and Vitner—and said that if the employees signed cards to bring the Union in, he would "close the doors." Davis asserted that Japp also questioned the employees as to their opinion of the Union. Davis replied that his wife thought that Jays

benefits were equal to what the Union might secure, but since he held a union withdrawal card, "it would help me to carry my card, because I wasn't getting any younger."

Japp, who states that he does not know Davis or Dietz, denied that he had a conversation with any employee of the character related by Davis. Japp, in particular, testified that he left the plant about 3 or 3:30 in the afternoon and was not present on the premises at the time of the meeting with the men or thereafter. Japp could give no reason for recalling what time he left the plant on that day, except that as "a general thing, if the plant wasn't running, I left early." He could not remember, on cross-examination, what time he left the plant on the next following Friday, and stated that he was able to recall his movements on October 3 after counsel jogged his memory on the subject, though he could not recall what counsel said.

Dietz did not testify. Neither counsel called him, nor was there any showing that he was available to testify. No other witness recalled seeing Japp, Sr., about the plant after the meeting.

Counsel for Jays, in his brief (p. 20), places particular stress on the time element involved as impeaching Davis. Thus, Davis, who came in at the very end of Martilla's meeting with the men, asserted that the conversation with Japp occurred "shortly after the meeting," at "approximately 6:15 p.m." Counsel points out that the meeting began about 5 p.m., was of short duration, and was over no later than 5:30 p.m.

My impression of Davis at the hearing was that of a rather intent witness trying to give accurate testimony. I do not believe that he fabricated this incident out of whole cloth. After giving careful consideration to the factors set forth above and the entire record, I credit Davis' account set forth.

I find that by the threat made by Japp, Sr., to "close the doors" if the employees brought the Teamsters in, Jays violated Section 8(a)(1) of the Act. I do not believe

that in the circumstances of this case, Japp's remarks conveyed an impression of surveillance, as General Counsel alleges. The record shows that the drivers' activities were much discussed by the drivers and by supervisors, and were known to Jays' management. Without some clearer indication that Japp was referring to a surreptitous source, I find that this allegation has not been proved. The allegation of illegal interrogation of Davis by Japp will be considered hereinafter. General Counsel agrees that no proof was adduced in support of allegation VI(h) of the complaint that Japp, Sr. threatened to withdraw certain benefits if the Union came in. It will be recommended that this allegation be dismissed.

(2) After the meeting, truckdriver Lull together with some other truckdrivers and Supervisor Staton went to a nearby tavern. During the course of a conversation in which Lull was asserting that he hoped there would be a good turnout of drivers at the meeting the next day, for he felt that "Jays is sure afraid of the Teamsters," Staton called Lull aside, apart from the other men, and told him, "Bob, you know the old man is talking about selling the fleet." Lull replied that he had heard this for a long time, to which Staton answered, "Well, this time the old man is serious."

Staton admitted in his testimony that, in this conversation, he told Lull "if the fellows keep fooling around like this, the old man is liable to sell the semi-truck operations." The record makes it quite clear that Staton was referring to the drivers' union activities.[10]

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[10] Staton's attempt to deny that he "knew" of the men's union activities, but only "assumed" they had contacted the Union was not persuasive. Indeed, the conversation at the tavern from which he withdrew with Lull necessarily informed him that there was to be a union meeting with the Teamsters. Staton in his pretrial affidavit stated that "by this time," he "knew" the drivers had contacted the union. I do not credit Staton's denial that he was aware at that time of "any union activities by the drivers," or that he did not know the drivers had contacted the union.

Staton gave two reasons for his statement to Lull on this occasion. He first said that this statement expressed his opinion "that management was going to get fed up with the harassment they were getting. . . . All these meetings we had, so forth, and discontent."[11] He further stated that he was prompted to say this to Lull by seeing a stranger wandering around the plant whom someone told him was Nielsen of Nielsen Cartage.[12] Staton denied that anyone in management told him, prior to November, about the "sale of the cartage operation." Based upon my assessment of Staton's testimony, and the whole record, I am not inclined to credit his denial.

I find that by Staton's threat that the trucking operation would be sold if the employees continued in their union activities, Jays violated Section 8(a)(1) of the Act.

(c) *Other alleged violations of 8(a)(1)*

(1) Driver James Paluch testified that in the month of October, sometime after the October 3 meeting, when he was at Jays' North Branch operation, Art Timmons, who frequently substituted for branch managers, engaged him in conversation. After an initial greeting, Timmons said, "I hear you guys are starting this union stuff again," to which Paluch answered that he did not know anything about it and did not want to know. (Paluch, in fact, had been one of the group that originally visited the Teamsters hall and had signed an authorization card.) Timmons then stated, "Well, I'll tell you one thing, you are getting the old man pretty mad and he is going to sell the trucks."

[11] Later, Staton stated that by "harassment" he did not "necessarily mean Union harassment," and then said, "I didn't mean union." In the absence of any better explanation, and on the record as a whole, I find, as has been noted, that Staton was indeed speaking of the drivers' union activities.

[12] Nielsen's testimony, however, was that when Nielsen first came to the plant, Staton was instructed by Jays' management to give Nielsen the drivers' logbooks. Staton admits that Martilla told him to give the logs to Nielsen and that he did so. At this point, I am convinced Staton was informed of Nielsen's purpose in the plant.

Timmons recalled being at the North Branch in October, but denied substituting for the branch management at the time. He did not recall having any conversation with Paluch during this period, but denied having the conversation attributed to him by Paluch. Timmons further admitted that during this period in October, he heard "scuttlebutt" and hearsay of union activities on the part of the tractor-trailer drivers, stating that the "scuttlebutt" "flowed throughout."[13] Timmons, like Staton, testified that he was not informed of or consulted about the impending "deal" with Nielsen prior to November 14.

I find that Timmons made the statements testified by Paluch as set forth above.

(2) Driver Siebert Kuiken testified that about November 5, Supervisor Staton said to him, "I heard that you fellows are going to join the Union or talking about joining the union, and, . . . if you do . . . the Old Man is going to sell the fleet." When Kuiken protested that he had heard this before, Staton replied that "this time he means it." Staton, in substance, admits this conversation.

I find that by Staton's threat to Kuiken and Timmons' threat to Paluch that if the drivers persisted in their union activity, Jays would sell its trucks, which the drivers

[13] Beyond this admission, on direct examination, Timmons tended to be rather vague, and seemingly evasive, about this "scuttlebutt." He agreed he "knew something was going on," but not "the nature of what was discussed." Though he denied that he "knew the semi-truck-drivers were trying to get a union," he also agreed that was the nature of the "scuttlebutt" which he heard from Branch Managers and Assistant Branch Managers (who are, as noted previously supervisory personnel). Timmons was uncertain as to the particular persons who relayed this information to him, but he was certain that he had not heard of it from Japp, Sr.

were employed to drive, Jays violated Section 8(a)(1) of the Act.

As has been noted hereinabove, Jays' management and supervisors engaged in considerable interrogation of employees concerning their union desires and activities. Much of this questioning occurred in a context of coercion and restraint, and several of the employees refused to answer candidly. Respondent offers no valid reason to justify this course of conduct. On this record, I find that Staton's admitted interrogation of several employees, Japp's questioning of Davis and Dietz, and Timmons' questioning of Paluch had a natural tendency, in the circumstances, to interfere with, restrain and coerce the employees in the exercise of their rights under the Act and, therefore, by such conduct, Respondent Jays violated Section 8(a)(1) of the Act.

3. The decision to contact Jays' delivery operations

(a) *The negotiations*

For a long time prior to 1975 several cartage companies in the Chicago area, including Nielsen Cartage, had sought to have Jays contract out Jays' delivery operations. These advances had uniformly been resisted by Jays on the basis that it was performing a highly successful operation in an efficient manner. According to the testimony of Martilla and Adolph Nielsen, it would appear that Nielsen was specifically well-regarded by Jays' management because of personal friendship between the Nielsen and Japp families. Nielsen and Martilla were members of the same country club and met here at regular intervals. Nevertheless, Nielsen's requests that his company be considered to take over Jays' delivery operations had been rejected over a period of 5 years prior to 1975.

Martilla and Nielsen recall that the latter again broached the subject of Nielsen Cartage taking over Jays' delivery

operations at a meeting at the country club in May 1975. Martilla states that Nielsen said he could perform the operation more economically than Jays and that he (Martilla) replied that "it is still our opinion that we are doing a pretty darn nice job with it." Martilla states, rather summarily, that he spoke to some management people about this inquiry, but clearly aroused no immediate interest.

Martilla states, and Nielsen confirms, that Nielsen again brought up the subject at the country club on August 24. Martilla asserts he remained skeptical that Nielsen knew enough about Jays' operations to be able to say he could do a better job, and that, in any event, in order to contract out the operation, Jays would have to dispose of its tractors, trailers and equipment. Nielsen replied that he was sure he could purchase the equipment. Martilla states that he invited Nielsen to visit Jays' operations to see if he could come up with some concrete figures upon which to make a proposal.

The two witnesses assert that Nielsen visited Jays' plant during the first week in September, observed the operation, and was given certain drivers' "logs" which he took away with him. According to Martilla and Nielsen about a week later, possibly about September 8 or 9, Nielsen presented Martilla with a written proposal based upon a "representative week" in Jays operations, July 22-August 2. Martilla, on this occasion, states he introduced Nielsen to Thomas Stanislawski, Jays' executive vice president and treasurer, for discussion of the value of Jays' delivery equipment.It is stated that they agreed to accept book value of the equipment. Martilla and Nielsen next met, as they testified, at the country club on September 17, when Martilla suggested that Nielsen present another proposal based upon a more recent week in the delivery operations. Nielsen agreed to visit the plant again. Martilla says that the two men discussed the number of drivers Nielsen would employ if he obtained the contract and that Nielsen said he could do the job with 23

drivers. Jays was then employing 26 drivers.[14] In addition, Martilla, who was aware that Nielsen Cartage had a bargaining agreement with the Independent Union, expressed concern that Jays' operations might be shut down because of a strike by Nielsen Cartage employees, which Martilla said had never occurred with Jays' employees.[15] Nielsen assured Martilla that he need have no worry on that score, that Nielsen would take appropriate action to prevent it.

On September 30, Nielsen gave Martilla a second written proposal based upon Jays' operations for the week of September 21-27. On October 1, Martilla called Nielsen and told him "it looked like we had a deal," and that Nielseon should prepare a formal contract for Jays' consideration. Nevertheless, Martilla said that Jays wished to go over Nielsen's computations with him in detail because "[we] didn't necessarily agree with his computations." Nielsen delivered a written contract proposal the next day. As discussed below, the parties came to a final agreement, on October 9, subject to certain authorities which Nielsen Cartage was required to secure from the Interstate Commerce Commission.

In contrast to the above version of these events, which tends to place much of the negotiations prior to the latter part of September, when the truckdrivers became particularly active in seeking help from the Teamsters, Nielsen in his prehearing affidavit, made December 9, refers

[14] In fact, however, the first proposal assertedly presented on September 8 or 9 and the next proposal on September 30, were based on employing 22 drivers. The discrepancy is not explained, nor is there any explanation of how Nielsen determined he could accomplish the work with four fewer drivers.

[15] Jays management apparently had a constant concern that unionization of its employees would lead to interruption of its operations and opposed union organizing efforts on that ground, as set forth in literature distributed to the driver-salesmen (GC Exhibit 16).

to only one meeting with Martilla at the country club, in the third week of September; says that he was invited to and visited Jays' operations after that, "in late September;" that Martilla asked for Nielsen's prices "at the end of September," which Nielsen furnished, whereupon Martilla "a day or two later" called "and said it looked as if we had a deal." At the hearing, Nielsen asserted that his affidavit was in error. It is noted, however, that one part of Nielsen's cost computations which Martilla asserts (with some doubt) was presented to him by Nielsen on or about September 8 or 9, is inexplicably dated October 1, 1975. From my observation of the witnesses and consideration of the facts, I am persuaded that such contacts and discussion as may have occurred before September 17 were more casual and less definite than the witnesses indicated in their testimony, and that some later events may have been transposed to a slightly earlier time.

On October 9, Nielsen met with Martilla, Stanislawski and Japp, Sr., with some other management personnel present part of the time. After Nielsen agreed to slightly reduce the price he was asking to perform Jays' delivery operations, Jays agreed to contract the operations to Nielsen. In an effort to expedite the process of securing operating authority from the I.C.C., Nielsen Cartage requested emergency operating rights to haul Jays products in interstate commerce. When Nielsen, who had continued telephone contact with Martilla in the interim, advised the latter on November 7 that the I.C.C. had granted the necessary authority, Martilla pressed Nielsen to take over immediately. Nielsen advised Martilla that this could not be done before November 17.

On Friday evening, November 14, Jays' truckdrivers were assembled at the plant where they were advised by Martilla that Jays' delivery operations was being taken over by Nielsen on Monday and that their employment with Jays was terminated. Martilla introduced Nielsen who told them that he intended to hire as many of them as he could. Nielsen stated that he would require 22 or 23

drivers for the operation, but that under Nielsen's Cartage's contract with the Independent Union, certain employees of Nielsen Cartage had the right to bid on this new work, and he would not know until the next day the full number who would desire to transfer. Nielsen made arrangements with the men to come to his office the next day to ake application for employment.

The contract between Jays and Nielsen Cartage for the performance of Jays delivery operations became effective November 17.

(b) *Jays' reasons for contracting out its delivery operations*

According to Martilla and other management witnesses, Jays decided to contract out its delivery operations for three reasons: 1) Nielsen's figures indicated that Jays might save considerable money; 2) sale of Jays' equipment would release a considerable amount of capital invested in equipment; and 3) Martilla would be relieved of responsibility of overseeing the delivery operation.

1) *Projected savings.* At one point, as has been noted, Nielsen prepared an estimate of his price for performing Jays' delivery operation for the week of July 27-August 2. Based on using 22 drivers, Nielsen estimated he would have charged Jays $21,232.01 for that week. Jays' records showed a cost of $23,203.32 for that week. A worksheet drawn up by Stanislawski also showed that for the first 35 weeks of 1975, Jays' cost for the delivery operation averaged $22,552.22 per week. A second estimate made by Nielsen for the week of September 21 to September 27 was that Nielsen Cartage could have performed these operations for that week for $18,492.50, based on a payroll of 22 drivers. No evidence was presented as to Jays' costs for this latter week, as was done for the prior week, so no comparison can be made. Assuming there was a typical week in Jays' delivery operatios, the week of September 21-27 would not seem to be one of them. It is noted from Stanislawski's 35 week analysis (Resp. Exh. 13),

weekly delivery costs tended to vary widely. Martilla testified that he and Stanislawski were sure that Nielsen could not save Jays as much as indicated, but say that the figures indicated that there would be a savings.

At the hearing General Counsel objected to Respondent's offer to prove that Jays had actually enjoyed a savings in its delivery operation since Nielsen Cartage took over. The objection was sustained on the ground that Respondent's motive must be determined as of the time the operation was contracted out, not by its subsequent experience. Jays counsel agreed that even if the evidence showed that Jays had made a mistake and had not saved any money, this fact would not have probative value in assessing Jays' motive.

Since the hearing, however, I have had access to *Jays Foods, Inc., supra,* which was not cited to me at that hearing. As noted in that case, the Trial Examiner based his decision, in part, on the fact that Jays made no comparison of costs either before or after contracting out its maintenance operations. While I am not persuaded that my ruling at the trial was wrong, I have given careful consideration the facts Respondent states it would have proved if it had been permitted. According to this offer, Stanislawski compared Jays' experience from January through March of 1975 with payments made to Nielsen Cartage for delivery services for the same period in 1976. Stanislawski further adjusted Jays' costs by taking into account the 32 cent raise given in October and a second 32 cent raise which it is alleged would have been given the drivers by Jays in January 1976. It is stated that the figures show an average savings of roughly $1,000 a week on such a basis. (General Counsel, of course, had no opportunity to cross-examine this material.)

Notably, moreover, Stanislawski went further in his comparative cost analysis: he felt impelled or was requested by Martilla, to make an analysis of how much more Jays' delivery operations would have cost (and consequently how much more it saved by farming it out) if

Jays had been paying the *union scale* during this period.[16] This, obviously seems to indicate, contrary to Jays' insistence, the employees' abortive attempt to secure representation by the Teamsters was a factor in the decision to contract out of the delivery operations. Two instances of testimony by Jays management bear signifiicantly upon this issue.

In the midst of testifying concerning his discussion with Martilla concerning the figures on Respondent's Exh. 13, and the possible savings which it indicated, Stanislawski stated, "well, we discussed about the 32 cents an hour, which would be additional savings and then plus another addition that was promised to the drivers at the time *and we also discussed that should we get involved in paying the men more, say union scale at the time,* which I don't know what it was, I think about $7 and some cents there, the savings would be greater." (Emphasis added.) This conversation clearly took place before September 30, for Stanislawski specifically places his next following conversation with Martilla at "the latter port of September. I'd say about September 30."[17]

Also bearing on this issue is the testimony of Japp, Sr., with respect to his conference with Martilla and Stanislawski, in early October, when Japp apparently gave his consent to contracting out the delivery operations to Nielsen Cartage. In the course of testifying about the discussions that day, Japp testified, "I can't remember anything that was said, but I know that we did say that if we

[16] The Union scale referred to was not identified. Manifestly it was not that of the Independent Union for that union was not seeking to organize Jays at the time.

[17] Stanislawski at a later point denied that the word "union" came up in his discussions with Martilla in reference to these matters and asserted that he was sure that he "never discussed the union scale in any of [his] computations." On direct examination, Stanislawski admitted such a discussion of the "union scale" in connection with his most recent computations made at Martilla's request in preparation for trial of this matter.

could get out of the trucking business and give it to somebody who knew how to do it, we could then get back to selling our merchandise which we knew something about, *because going through all these litigations, why it was taking up a lot of time and costing a lot of money that we didn't have. . . .*" (Emphasis added.) Japp later stated that he was "referring to the litigation that we had with the driver-salesmen and the union, and stuff like this that we went through before, and it cost a lot of money."[18] In the circumstances, and upon the record, I find that this statement referred to concern over union activities of the truckdrivers. I do not credit Japp's testimony to the contrary.

(c) *The contract; present operations*

There is no evidence of ownership or control by Nielsen Cartage or its management in Jays, or by Jays or its management in Nielsen Cartage, other than the terms of the contract which they executed on November 17. The record does show that the close personal relationship between the parties permeated their contractual dealings. Thus, after Jays management succeeded in getting Nielsen to slightly lower his price, Japp, Sr., admonished Nielsen to be sure of his figures, saying that because of their personal relationship, he did not want Nielsen to be hurt by their deal.

As part of the contract, Nielsen Cartage paid Jays $62,632.00 for the tractors purchased from Jays; $22,-569.06 for parts, supplies and equipment; and agreed to pay Jays $76, 448.00 for Jays' trailers, payable at the rate of $1,830.66 per month over a 4 year period. The record shows that these sums had been paid as agreed up to the time of the hearing. It appears that Nielsen has acquired the two diesel tractors which had formerly been leased by

[18] Japp denied that this statement indicated concern about possible litigation involving the truckdrivers, but admitted that the litigation concerning the driver-salesmen had been completed at this time.

Jays, and has purchased the three trailers which Jays had previously ordered.

Since November 17, the equipment used in transporting Jays' products has been kept on Jays' premises, as was the case before the contract was made. The truckdrivers, now employed by Nielsen Cartage, report to the Jays' plant, as before, where they are daily dispatched by a dispatcher employed by Nielsen Cartage from an office on Jays' premises. (There is no indication of any charge to Nielsen for use of Jays' premises.) The employees are covered by Nielsen Cartage's contract with the Independent Union, have been required to join that union by the terms of the agreement, and appear to receive better wages and benefits under that contract than they received from Jays. However, it may be that their seniority rights are less.

Under the provisions of paragraph 1(c) of the contract between Jays and Nielsen Cartage, the agreement can be cancelled upon 30 days notice in writing by either party. Nielsen Cartage agrees to give Jays exclusive use of certain listed vehicles from November 17, 1975, to November 17, 1980, with the right in Jays to repurchase the vehicles at certain annual periods in accordance with stated conditions. The contract sets forth the rate which Nielsen will charge for each vehicle per week, with provisions for increased, or decreased charges according to the conditions set forth.

4. Analysis and conclusions

The facts in this case are convincing that Jays subcontracted its delivery operations and discharged its drivers because of their union activities.

For a considerable number of years, Jays had resisted efforts of outside cartage firms to take over Jays' delivery operations notwithstanding arguments to the effect that such firms could no the work more economically and efficiently. It is plain that Jays considered it important to retain in its own hands the flexibility of immediate control

and supervision of the daily operations carrying its fragile products to the various distribution points. As Martilla put it, Jays considered that "we are doing a pretty darn nice job with [the delivery operation]." Jays' business success indicates this was an understatement.

Why then did Jays in the fall if 1975 suddenly sell its trucks and subcontract out its delivery operations?[19] The answer is clearly indicated in Jays' hostility to the employees' activities on behalf of the Teamsters, the threats by various supervisors and management that the delivery operation would, indeed, be contracted out and the trucks sold (or that the doors would be closed) because of the employees' union activities, and by the testimony of Japp, Sr., and Stanislawski, as found above, to the effect that the possibility of the Teamsters coming in was a substantial factor in the decision to subcontract the operation.[20]

In defense of its action in subcontracting out the work, Jays contends that when it did so, it was unaware of the drivers' union activities, and, in any event, was motivated by financial savings and operational benefits to be secured. The overwhelming evidence is that the drivers' union activities was well known to Jays' management and supervisors and I so find. While I find the cost comparisons relied upon by Jays to be something less than accurate presentations of probable savings by contracting to Niel-

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[19] For reasons previously noted, I have found that the discussions between Nielsen and Jays with respect to the former taking over Jays' delivery operations did not become serious until the late part of September, when the employees began contacting the Teamsters, leading to a tentative decision on October 1, and a firm decision on October 9 to contract out the operation.

[20] In the only other successful organization of Jays' employees by a union not favored by Jays, the company also contracted out the maintenance operation involved there. Though the Independent Union once briefly represented Jays' truckdrivers, when the drivers rejected the deal made by the company and the Independent Union, the latter withdraw. The employees were told by Martilla that Jays still favored the Independent Union.

sen,[21] I have no doubt that some dollar savings may be realized by Japp. I do not believe, however, that Jays would have departed from 35 years of highly successful business practices, abandoning its complete control over a complex delivery system, involving speedy, dependable delivery of fragile, perishable products which require special handling by experienced personnel, but for the advent of the drivers' effort to bring the Teamsters into the operation.

In addition to the factors which have been previously set forth, I note that although Jays claims negotiations were initiated in May with Nielsen concerning contracting out this operation, and though Jays assertedly found it necessary to cut back on expenses between May and July because of adverse market conditions, no effort was made during *that period* to act on Nielsen's contention that he could perform the deliveries more economically than Jays. However, after the drivers began their union activity, the negotiations became accelerated and the decision made.

The applicable legal principles have recently been set forth by the Seventh Circuit in *N.L.R.B.* v. *Townhouse T.V. and Appliance, Inc.*, 531 F.2d 826, as follows:

> It is well settled that an employer violates Sections 8(a)(3) and (1) of the Act by subcontracting part of an integrated business and dismissing the persons employed therein if the action is motivated at least in part by anti-union considerations. *N.L.R.B.* v. *National Food Stores, Inc.*, 332 F. 2d 249 (7th Cir. 1964); *N.L.R.B.* v. *George Roberts & Sons, Inc., d/b/a The Roberts Press*, 451 F. 2d 941, 845-946 (2d Cir. 1971). Of course, as Townhouse argues, the converse is true, i.e., an employer does not violate Section 8(a)(3) and (1) if he makes a decision to subcontract

[21] In each case estimates of yearly savings are made by extrapolating Nielsen's estimate based on a *single weeks'* activity. The asserted experience after contracting to Nielsen is based on noncomparable periods which is also probably affected by changes in Jays' business activities.

> solely for sound business reasons. *Jays Foods Inc.* v. *N.L.R.B.*, 292 F. 2d 317 (7th Cir. 1961); *N.L.R.B.* v. *Rapid Bindery, Inc.*, 293 F. 2d 170, (2d Cir. 1961).

Based upon the above, and the entire record in this case, I find that Jays, by contracting out its delivery operations to Nielsen and by discharging its truckdriver employees[22], on or about November 14, because of their union activities, violated Sections 8(a)(1) and (3) of the Act.

D. *Case No. 13-CA-14890*

The allegation of the complaint in Case No. 13-CA-14890 assert that Respondent Nielsen Cartage refuse, about November 15, to hire Siebert Kuiken, Robert Lull, James Paluch, Henry Goodman and Richard McCormick (who were among the drivers discharged by Jays the day before) because of their union activities.

Nielsen, on November 14, requested all of Jays' drivers who wished to work for Nielsen Cartage to appear for interviews at his office the next morning. As the man arrived, they were requested to fill out employment applications and were then interviewed in groups. Later that afternoon, Nielsen or another agent called the applicants to inform them as to which had been rejected and which would be employed. At that time, eight Nielsen Cartage employees had bid to transfer to the work at Jays. Nielsen hired 15 of the applicants from Jays. Among those not hired were the five named in the complaint. These were among the oldest, and presumably the most experienced employees in

[22] These employees are: Siebert Kuiken, Richard McCormick, Jack Whalen, Paul Knott, Albert Philip, Robert Lull, Henry Goodman, Thomas Richards, Charles Dietz, James Paluch, Robert Vitner, Gary Redelsperger, Charles Vogel, John Short, Gerald Dildine, Charles Merrick, Raymond Prince, James Chapman, Dennis Altgilbers, Edward Sallay, Craig Mullins, Lawrence Rossi, David Butkus, Raymond Hansen, Lauren Hodson, Ronald Davis.

Jays' delivery operations.[23] These five were also in the front ranks of the employees seeking Teamster representation.

Nielsen's asserted reasons for deciding which of the applicants he would hire leave much to be desired. At the hearing, and in his prehearing affidavit, Nielsen asserted that he relied upon 1) his examination of the drivers' logs, 2) records from the State of Illinois showing the drivers' moving violations (MVRs), and 3) upon his interviews with the drivers. However, General Counsel proved, and counsel for Nielsen Cartage concedes, that Nielsen had not received the MVRs on November 15 when the men were informed as to who would be hired and who would not. Nielsen never explained how the drivers' logs (involving hundreds of pieces of paper), which he last examined on September 30 for the purpose of making a cost proposal to Jays (and not for the purpose of determining who should be hired), aided him in making his selections. Nor did he point out the factors in the interviews which influenced his decision.[24]

General Counsel contends that Nielsen was informed by Jays of the identity of the five union adherents and acceded to Jays' request that these five not be employed. This is denied by Nielsen. The key to General Counsel's contention is the testimony of Lull, which I credit, that on November 15, Supervisor Staton told Lull that during the week previous Nielsen had come to him with a list of drivers he was going to employ; that Staton told Nielsen that there were drivers on the list whom Staton would not

[23] Kuiken was first in seniority, McCormick second, Lull seventh, Goodman eighth and Paluch eleventh among 26 employees.

[24] Council for Nielsen Cartage indicates that Nielsen relied also on information in the driver applications. Nielsen asserts that after the interviews, he "sat in my office with the applications and determined which 15 drivers I was going to hire." This was not mentioned in his pretrial affidavit. I am persuaded that this was an afterthought at the hearing.

employ; and that Nielsen replied that was "the way Si [Martilla] wanted it."[25] General Counsel contends that this may be accepted as an admission against interest binding on both Jays and Nielsen Cartage.

There is no showing in this record of any connection between the two respondents other than long term and apparently deep friendship of their managements and the contractual relationship between them which is the subject of this case. There is no common ownership, nor interlocking directors or officers. Nor is there any showing of a common labor relations policy or joint control over employees of either of them, except as may inhere in their contractual relationship. Staton is shown to be a supervisor of Jays, but not of Nielsen. In the circumstances I find that Staton's statement to Lull cannot be held an admission binding on Nielsen. Though General Counsel's evidence raises strong suspicions that Nielsen failed and refused to hire the five named drivers on November 15 because of their union activities, it does not prove the allegations of the complaint and I shall recommend that it be dismissed.[26]

E. *Case No. 13-CA-14955*

The complaint in Case No. 13-CA-14955 alleges that Jays discharged Edward Olson on December 1, 1975, because of his union or other concerted activities protected by the Act.

1. Olson's union activities

Edward Olson had been employed by Jays as a driver-salesman at Jays' West Branch for over 20 years. In 1975,

[25] Staton admitted speaking to Lull on this occasion, but denies saying that he had spoken with Nielsen about the selection of drivers. Both Staton and Nielsen deny that they had a conversation such as that related in Lull's testimony.

[26] The record shows that the five men have since been hired by Nielsen in January 1976.

Olson contacted the Retail Clerks Union in an effort to have that union organize Jays' driver-salesmen, persuaded a number of his fellow workers to meet with representatives of the Retail Clerks and secured signed authorization cards from a majority of his fellow workers at the West Branch. These activities were open and carried on largely around the West Branch. The employees' activities on behalf of the Retail Clerks, as had the truckdrivers' activities on behalf of the Teamsters, came readily to the attention of Jays' supervisors. Thus Brand quickly found out about the employees' meeting with the union. I find that Jays' management was aware of Olson's organizing activities on behalf of the Retail Clerks.

At the election conducted by the Board on October 2, 1975, Olson was the union observer at the West Branch. As previously noted, the Retail Clerks lost the election. After the election was concluded, according to Olson's credited testimony, Japp, Sr., approached him and extended his hand in a handshake, and in an unfriendly, insincere tone said, "Thanks a lot, Ed."[27]

2. Events leading to Olson's discharge

The incidents which allegedly triggered Olson's discharge concerned the manner in which he served two customers on his route—a Jewel store and a National store —on Friday, November 28, the day after Thanksgiving, and his failure to come in to work on Saturday, November 29, to serve these two customers.

Jays branches are not normally open on Saturday, for the driver-salesmen normally work a 5-day week. The rule with respect to weeks in which a holiday falls is somewhat different. Though Jays witnesses were not altogether consistent with respect to whether the rule had been changed in 1975, they were agreed in general that driver-salesmen were permitted to work a 4-day week in those

[27] In making this finding, I have considered Japp's apparent denial of this testimony.

weeks in which a holiday fell on a working day, provided the driver-salesman had provided for his customers'needs, that is, took care of his 5 day schedule in 4 days.[28] Branches are normally open on Saturdays in weeks in which a holiday falls on a working day and salesmen may service their customers on that day.

On Friday, November 28, Olson arrived at the Jewel store on Mannheim Road on his route at 2:10 p.m.[29] The receiving clerk at the store refused to accept delivery of Jays' products on the ground that receiving hours at the store ended at 2 p.m. Olson sought permission from the store manager to make the delivery and was refused. Earlier in the day, at the National store on his route, Olson examined the Jays' products on the shelves, determined that there was sufficient for the weekend and did not deliver additional product.[30]

After returning to the West Branch that afternoon, Olson performed his normal end-of-week paperwork, ordered his products for the following Monday delivery, loaded his truck and was checked out by Branch Manager Brand. Brand noticed that no sale was listed for the Jewel store (stated to be the largest account on Olson's route), and asked Olson about it. After Olson explained, Brand gave a noncommittal reply, indicating that he was satisfied with

[28] Each driver is scheduled to visit each customer on his route on a designated day of the week. In a holiday week, the driver-salesman had to fit into his schedule the customers missed on the day of the holiday.

[29] Jays claims it was told by the store manager that Olson arrived at 2:20 p.m. The point is not important. Olson's is the only direct testimony on the point and I credit it. As will be noted hereinafter, I am persuaded that Jays' witnesses tended to overstate or exaggerate Olson's shortcomings.

[30] Again, Jays claims that it was told at the store that Olson had not been seen at National store. Olson's direct testimony is credited.

the explanation.[31] Olson signed out, telling Brand, "Good night. See you on Monday." Brand, however, denies that he knew that Olson had made out his weekend inventory, or made his Monday order (but none for Saturday), or that he heard Olson say he would see Brand on Monday, thus, in effect, contending he had no reason to know, on Friday afternoon, that Olson was not coming in on Saturday morning. Brand admitted, however, that Olson's records which he had before him did not contain certain markings which were customary to indicate that Olson intended to visit the Jewel store the next day.

On Saturday, November 29, 7 of the 24 driver-salesmen at the West Branch came in to work. Brand checked the records of the remaining salesmen, and made notes of seven customers for whom no sales were shown for Friday. Brand asked Donald C. Skafgaard, the assistant branch manager, to investigate three of the stores listed, including the Jewel and National stores on Olson's route, Brand stating that he would take the remaining four. Skafgaard later reported that the Jewel store was almost completely out of Jays products, and the manager would not accept a later delivery that day. He reported that the National store was "out of product," and that he would replenish the stock at that store. Skafgaard also returned to the West Branch to pick up more product to be delivered to the third store on his list, which also had not been served on Friday by another driver-salesman.[32]

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[31] Olson says Brand merely replied, "Oh," indicating that he was satisfied. Brand asserts that he said, "Okay, we'll take care of it."

[32] This driver-salesman was not criticized or disciplined for failing to serve this customer or for not coming in on Saturday. Skafgaard carefully explained that the delivery to this third store was not really necessary, in contrast to the situation at Olson's customers. The explanation was less than persuasive. Thus if the third store needed additional stock, as seems to have been the case, since Skafgaard made a special trip for this purpose, I would have expected that the other salesman would have at least been criticized.

Brand states that the four stores on his list were adequately supplied.

Brand spoke with Olson when the latter came in to work on Monday, December 1, and advised him that he was suspended until further notice. Brand states that he then spoke with Skafgaard, who told him that this was an "[i]mpossible situation . . . he just doesn't do the job, hasn't done the job for this week, and this Jewel, we have never had a situation like this. We not only lose the business for the entire weekend, but we might even lose the account." Skafgaard went even further in his testimony, asserting that he told Brand that Jays might lose the entire Jewel account and the entire National account because of Olson's failure to serve these customers on Saturday.

I doubt that these things were said as reported. In the first instance, Skafgaard had actually worked at the West Branch for only a very few weeks as assistant branch manager, previously having been a salesman at another branch, and would hardly have been quite so assertive about past experience at the West Branch. Further, as shown by Brand's testimony of his conversation with Martilla set forth hereinafter, Brand seems addicted to the use of "impossible" to score the point he is trying to make. Lastly, I do not believe that the two men were concerned about losing these accounts as stated. The National store was served on Saturday, and no difficulty was experienced in supplying the Jewel store on Monday, December 1.

After suspending Olson, Brand then called Martilla, advising him of the situation involving the Jewel and National stores on Olson's route. Brand states that he told Martilla that Olson was "not trying," and was working "with the least momentum possible. The results the same, the least. It's an impossible situation." According to Brand, Martilla agreed that it was "an impossible situation," and asked what Brand wanted to so. When Brand insisted upon Olson's immediate termination, Martilla states he suggested a lighter penalty, pointing out that

Olson had to be employed 4 more weeks to get his yearly bonus, which he would lose if discharged before the end of the year. Martilla finally told Brand to write up Brand's recommendation for Olson's termination and to transmit it to Martilla.

Olson was discharged by Brand in a telephone call later in the day, on December 1.

3. The asserted reasons for Olson's discharge.

Brand testified that the reasons for Olson's discharge were set forth in the Termination of Employment memo which he submitted to Martilla on December 1. This states:

> Very poor sales, lowest in West Branch. Caused by least amount of on-job sales time, 4 days only week of 11/29/75. He allowed two accounts, one Jewel and one National, to be out of stock on Jays items for the week-end 11/29 & 11/30 due to no-sale by him 11/28/75.
>
> No arrangements made by E. Olson for delivery of product on Saturday 11/29/75. He knowingly permitted and approved out of stock for Customers & resultant loss of sales to Customers & Jays when he checked out for the week 11/29/75 disregarding opportunity available for completing his Route Sales on 11/29/75, increasing his sales commissions and satisfying Jays Customers.

The memo further states that Olson is not recommended for reemployment.

Brand further testified that Olson was the first, or among the first to check in every day; that he "was continually Twenty-four" among the driver-salesmen at the West Branch in dollar volume of sales; that Olson brought in very little new business; and that Brand frequently spoke to Olson about these matters, to which Brand states Olson would reply that he was doing the best he could,

and that he had all the retail outlets on his route. Martilla testified that Brand had also told him that "some years prior," when some routes opened up, "Olson had not bid for routes on which he could have made considerably more money." Respondent Jays further asserts that a comparison of Olson's production for the period from July until he was terminated with his replacement's production for the period from December until mid-April 1976 shows that the replacement produced a higher dollar volume of sales.[33]

Upon analysis, however, most of these criticisms do not appear to stand up well. While Olson's dollar volume of sales, with the exception of 1 or 2 weeks, was consistently in the lower half of the group at the West Branch, he was not, as Brand testified, "continually Twenty-fourth" (indeed, during much of the time referred to by Brand there were only 23 regular routes at the West Branch).[34] While Brand did not seem too certain on cross-examination about the new accounts which Olson had brought in, he did agree that just before Olson was discharged, Olson had solicited and secured a good new account which was thereafter served by his replacement.

While ranking salesmen by dollar volume may be a useful technique to incite sales competition among the salesmen, it is not a very accurate way to compare actual

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[33] In a memo apparently prepared by Brand and signed by Skafgaard, which was given General Counsel during his investigation of the case as a basis for Olson's discharge, it was additionally claimed that Olson "Dawdled around—A.M. reload—coffee—mens room—and would be among last to leave for route." No testimony was adduced in support of these contentions.

[34] Thus, while Olson was ranked 24th in 22 weeks during the 2-year period referred to by Brand, and was 23rd in 25 weeks, he was ranked 22nd during 16 weeks, 21st during 15 weeks, 20th during 11 weeks, 19th during 4 weeks, 15th during 3 weeks, and in 1 week each was ranked 3rd, 11th, 12th, 16th, 17th, and and 18th among the driver-salesmen at the West Branch.

effort. Thus the record indicates that the various routes are different in size and sales potential. This is borne out by Brand's comment that Olson could have bid on other routes on which he could have made considerably more money. It is further noted, as set forth below, that Olson's replacement continued to have low rankings among the West Branch salesmen after Olson's discharge.

The contention that Olson's replacement performed more satisfactorily than Olson seems highly questionable. The periods and the conditions compared are much different. Among other items, the replacement is credited with income from the good new account secured by Olson just before his discharge. Moreover, it is noted that for the first 21 weeks after Olson's discharge, the replacement was ranked 24th among West Branch salesmen on eight occasions, and on nine occasions, was ranked between 20th and 23rd. Olson's failure some years ago to bid on a more lucrative route may (or may not) indicate a lack of sales aggressiveness on his part, but he was obviously privileged to use his seniority in this way so long as he properly covered the route that he did bid on.

Respondent argues in its brief that Olson's production was affected by the fact that he ate lunch at home about three times a week (Olson stated that his home was convenient to his route), instead of eating in a restaurant along the way, and by Olson's admission that he sometimes rested for short periods at home. However, it is not shown that this prevented Olson from adequately covering his route. There is no evidence of any occasion prior to November 28-29, that Olson may not have properly served any customer on his route. Nor is there any showing that Jays was aware that Olson stopped by his home during the day, except for a conversation between Skafgaard and Lull at a New Year's Eve party in 1975, after Olson was discharged.[35]

[35] Counsel for Jays asserted that there was common talk at the West Branch that Olson went home during the day to care for his pigeons. There was no proof of such gossip. Olson denied that he did so.

Lull testified that he had a conversation with Skafgaard at a New Year's Eve party in 1975, at the home of another former truckdriver for Jays, in which, in response to query from Lull, Skafgaard told him (Lull) that Martilla had instructed Skafgaard to follow Olson because he was prounion and because his sales were down; that Skafgaard had caught Olson at home at 11 o'clock in the morning when he should have been on his route; that Skafgaard had checked a few of Olson's big stores and found they were out of merchandise; and that Olson's replacement with 3 months experience with Jays had higher sales than Olson; and that Jays "was going to court" on January 7 with respect to Olson.[36]

Skafgaard denied Lull's testimony, except that he stated he had "no recollection" of telling Lull about meeting Board agents about the Olson matter. Skafgaard further denied that anyone had discussed Olson's union activities with him, or that anyone had told him to follow Olson, or that he had done so. I credit Lull. He not only seemed to be an honest witness, as has been noted, but his testimony is consistent in detail with the record as a whole.

4. Analysis and Conclusions

Respondent Jays' motive for discharging Olson presents a very disturbing problem. Olson clearly failed to serve a Jewel store, the largest customer on his route, on November 28 (perhaps without his fault), and also failed to come in on November 29 to serve that customer.[37] I have no doubt that this would be upsetting to the management of Jays, though, as I have noted, I believe the

[36] In fact, Jays had an appointment to meet with representatives of the Regional Office on January 7 to present Jays' defense to the charge that Olson had been discriminated against.

[37] I am not so sure, notwithstanding Assistant Manager Skafgaard's testimony, that Olson failed to serve a National store on that occasion.

testimony on this score was somewhat exaggerated. In such circumstances, the discharge of a new employee might not be noteworthy, although the record indicates that the discharge of driver-salesmen by Jays is not frequent. However, the discharge of a salesman with over 20 years seniority who apparently had never done anything like this before requires closer consideration.[38] Indeed, the record shows that Branch Manager Brand had developed such an hostility toward Olson that he was unwilling to permit Olson to continue at work for the 4 more weeks necessary that he might get his yearly bonus. Jays seeks to account for that hostility by showing that Olson's dollar volume was usually near the bottom of those driver-salesmen employed at Jays' West Branch, which Jays attributes to a lackadaisical attitude on Olson's part. On the other hand, the record shows that Jays' management was aware that Olson's route as such was a low producing route.[39] Notwithstanding Brand's testimony that he constantly spoke to Olson about his production—which is fairly normal procedure in respect to salesmen in this type of industry—there is no evidence that Olson was in any danger of losing his job prior to his activities on behalf of the Union and his serving as one of the observers at the election on October 2.

As has been found, Jays is clearly hostile to unionization of its operations. The record further shows that Japp, Sr., Jays' chief executive officer, was concerned over the margin of the Company's victory over the Retail Clerks in the election, and indicated his personal displeasure at Olson's role, immediately after the election. The fact that Branch Manager Brand was actively seeking to secure a reason to discharge Olson is shown by Skafgaard's admission to Lull after Olson was terminated.

[38] The record shows that in one other case, a driver-salesman was given one or more warnings before discharge.

[39] Notwithstanding the somewhat higher dollar volume produced by Olson's successor on the route, the successor continued to rank low among the salesmen at the West Branch.

Respondent Jays manifestly had the right to discharge Olson because he was a poor salesman, or for failing to serve his customers, or for not being aggressive enough, if such was the case. However, on the basis of the above analysis and that record as a whole, I am convinced that Olson was discharged for his union activities and the reasons advanced by Jays are pretexts. It is therefore found that Respondent Jays, by the discharge of Edward Olson, violated Sections 8(a)(1) and (3) of the Act.[40]

F. Conclusion of Law

1. Respondent Jays Foods, Inc., and Respondent Nielsen Brothers Cartage Co., Inc., are each an employer engaged in commerce within the meaning of Sections 2(6) and (7) of the Act.

2. Chicago Truck Drivers, Helpers and Warehousemen Workers Union (Independent), and Local 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Retail Clerks Union Local 1550, affiliated with Retail Clerks International Association, AFL-CIO are each a labor organization within the meaning of Section 2(5) of the Act.

3. By ceasing its delivery operations, selling its trucks and contracting out its delivery operations to Respondent Nielsen Cartage because of the union activities of Jays Foods' employees, Respondent Jays Food engaged in and is engaging in unfair labor practices in violation of Sections 8(a)(1) and (3) of the Act.

4. By discharging the following named employees on November 14, 1975, because of the union activities of its employees, Respondent Jays Foods engaged in and is engaging in unfair labor practices in violation of Sections 8(a)(1) and (3) of the Act: Siebert Kuiken, Richard Mc-

[40] In coming to this conclusion, I have noted and considered Jays' argument that no other election observer for the Retail Clerks was discharged. It is not necessary that Respondent discharge every union adherent to effectively chill union activities among the employees.

Cormick, Jack Whalen, Paul Knott, Albert Philp, Robert Lull, Henry Goodman, Thomas Richards, Charles Dietz, James Paluch, Robert Vitner, Gary Redelsperger, Charles Vogel, John Short, Gerald Dildine, Charles Merrick, Raymond Prince, James Chapman, Dennis Altgilbers, Edward Sallay, Craig Mullins, Lawrence Rossi, David Butkus, Raymond Hansen, Lauren Hodson, Ronald Davis.

5. By discharging Edward Olson on December 1, 1975, because of his union activities, Respondent Jays Foods engaged in and is engaging in unfair labor practices in violation of Sections 8(a)(1) and (3) of the Act.

6. By threatening to sell its trucks and contract out its delivery operations and by threatening to close its doors because of the union activities of its employees, by granting benefits to its employees to discourage union activities, and by threatening to withhold benefits because of employee union activities, and by coercively interrogating its employees concerning union activities, Respondent Jays Foods engaged in and is engaging in unfair labor practices in violation of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Sections 2(6) and (7) of the Act.

8. Except as found hereinabove, Respondent Jays Foods did not engage in unfair labor practices as alleged in the complaints in this matter.

9. Respondent Nielsen Cartage did not engage in unfair labor practices as alleged in the complaints in this matter.

G. The Remedy

It having been found that Respondent Jays Foods, Inc. has engaged in certain unfair labor practices in violation of Sections 8(a)(1) and (3) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action to effectuate policies of the Act.

I.

It having been found that Respondent Jays Foods, Inc. unlawfully discharged Edward Olson, it will be recommended that Respondent Jays Foods, Inc. offer Olson immediate and full reinstatement to his former job, or, if such job no longer exists, to a substantially equivalent job, without prejudice to his seniority and other rights, privileges, or other working conditions, and make him whole for any loss of earnings or benefits suffered by reason of such discrimination, by payment to him of a sum of money equal to the amount he would have earned from the date of his termination as found herein to the date of Respondent Jays' Foods' offer to reinstate him as aforesaid, less his net earnings during that period, in accordance with the Board's formula set forth in *F.W. Woolworth Company,* 90 NLRB 289, with interest thereon at the rate of 6 percent per annum, as set forth in *Isis Plumbing & Heating Co.,* 138 NLRB 716.

II.

Respondent Jays Foods having unlawfully terminated and contracted out its delivery operations to Respondent Nielsen Cartage, and having unlawfully discharged the 26 employees who were employed in that operation, General Counsel contends that in order to restore the situation as it was before Respondent Jays engaged in these unfair labor practices, Jays should be required to resume its delivery operations and reinstate the discharged employees with whatever backpay and benefits lost by reason of their unlawful discharge. This is, indeed, the Board's normal remedy in cases such as this where ordering such resumption of operations would not create any undue hardship. See *Townhouse T.V. & Appliances,* 213 NLRB 716, and cases cited therein. There is no showing that such a remedy would create any undue hardship here. Jays appears to be a financially sound company; it had conducted this delivery operation successfully for over 30 years; the trucks continue to be housed on its property and used exclusively in its delivery

operations as before; and the contract between Jays and Nielsen Cartage makes clear that the parties contemplated that Jays might well wish to buy the trucks back and resume these operations.

However, it does not seem to me that it is necessary to order Respondent Jays Foods to resume the delivery operations (if it does not desire to do so), in order to provide a substantially adequate affirmative remedy for these unfair labor practices. In coming to this conclusion, I am strongly influenced by the fact that Respondent Nielsen Cartage has voluntarily hired 23 of the 26 discharged employees to perform Jays' delivery operations, apparently as before. The evidence is that their wages and benefits may be better than enjoyed before Jays contracted out the operation.[41]

Under the circumstances, I believe that an order requiring Respondent Jays Foods (1) to reimburse the 26 named employees for any loss of pay and benefits because of their discharge (in accordance with the Board's policies set forth above in paragraph I of this section) until such time as those employees obtain, or have obtained substantially equivalent employment[42], and (2), in the event that Respondent Jays Foods resumes the delivery operations contracted to Nielsen Cartage, or otherwise withdraws such delivery operations from Nielsen Cartage, to offer those employees reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent jobs, without prejudice to the employees' seniority and other rights and privileges, or other working conditions, would constitute an appropriate affirmative remedy. See, *e.g., Savoy Laundry, Inc.,* 148 NLRB 38. I shall so recommend.

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[41] I am to some extent concerned as to whether their seniority and job security may not compare with that enjoyed with Jays.

[42] Whether employment by Nielsen Brothers Cartage, Inc., or by any other employer constitutes substantially equivalent employment, if in dispute, can be determined in a compliance hearing.

III.

The complaint against Respondent Nielsen Cartage alleges, and General Counsel argues, that Respondent Nielsen Cartage is a successor to Respondent Jays Foods with respect to the delivery operations involved here, and as such is responsible for remedying those unfair labor practices which relate to the contracting out of those operations. It is, of course, well settled that a purchaser who "acquires and operates a business of an employer found guilty of unfair labor practices in basically unchanged form under circumstances which charge him with notice of unfair labor practice charges against his predecessor" may be held responsible for remedying his predecessor's unlawful conduct. See *Golden State Bottling Co.* v. *N.L.R.B.,* 414 U.S. 168. Where the purchaser cannot be charged with knowledge of the predecessor's unfair labor practices, however, the purchaser may not be held responsible for remedying those practices. *Ramada Inns, Inc.,* 171 NLRB 1060. The circumstances of this case arouse great suspicion that Nielsen knew that Jays was seeking to forestall its employees' attempts to bring the Teamsters in by contracting out the operation, but the circumstances are not strong enough to support a finding that Nielsen knew or should be charged with knowledge of Jays Foods' unfair labor practices. It is therefore found that Respondent Nielsen Cartage is not responsible for remedying Respondent Jay Foods' unfair labor practices.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended:[43]

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[43] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Jay Foods, Inc., the Respondent herein, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in or activities on behalf of Local 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or Retail Clerks Union Local 1550, affiliated with Retail Clerks International Association, AFL-CIO, or any other labor organization, by discharging its employees or in any other manner discriminating in regard to their hire or tenure of employment, or any term of condition of their employment.

(b) Granting, or promising to grant wage increases, or other benefits in order to induce its employees to refrain from union activities.

(c) Threatening to withhold wage increases or other benefits to induce its employees to refrain from union activities.

(d) Threatening to terminate its operations, or any part of its operations, or to sell its equipment because its employees have become members of a union or have engaged in activities on behalf of a union.

(e) Coercively interrogating its employees concerning membership in or activities on behalf of a union.

(f) In any other manner interfering with, restraining or coercing employees in the exercise of rights guaranteed under Section 7 of the National Labor Relations Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer Edward Olson immediate and full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent job, and make him whole for any loss of earnings he may have suffered by reasons of his discharge, in accordance with the provisions of the paragraph numbered I of the section entitled "The Remedy" above.

(b) In the event Respondent Jays Foods, Inc., resumes its delivery operations which were contracted to Nielsen Brothers Cartage, Inc., on or about November 17, 1975, or withdraws such delivery operations from Nielsen Cartage, offer the employees named below immediate and full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent jobs, in accordance with the provisions of the paragraph numbered II of the section entitled "The Remedy" above.

(c) Make the employees named below whole for any loss of earnings or benefits they may have lost by reason of their discharge on November 14, 1975, to the date Respondent Jays Foods, Inc., offers them reinstatement, or until such earlier time as each secures, or did secure, substantially equivalent employment, in accordance with the provisions of paragraph II of the section entitled "The Remedy" above.

Siebert Kuiken	John Short
Richard McCormick	Gerald Dildine
Jack Whelan	Charles Merrick
Paul Knott	Raymond Prince
Albert Philp	James Chapman
Robert Lull	Dennis Altgilbers
Henry Goodman	Edward Sallay
Thomas Richards	Craig Mullins
Charles Dietz	Lawrence Rossi
James Paluch	David Butkus
Robert Vitner	Raymond Hansen
Gary Redelsperger	Lauren Hodson
Charles Vogel	Ronald Davis

(d) Preserve, and upon request, make available to the Board and its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports and all other records necessary to facilitate the effectuation of the Order herein.

(e) Post at its plant and branch operations in and about Chicago, Illinois, copies of the attached notice marked

"Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 13, after being duly signed by an authorized representative of Respondent, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is dismissed as to alleged violations of the Act not found hereinabove in this Decision.

Dated, Washington, D.C.

/s/ Sidney J. Barban
Sidney J. Barban
Administrative Law Judge

[4] In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX "G"

Sections 10 (b), 10 (c), 10 (e) and 10 (f) of the National Labor Relations Act, as amended by The Labor Management Relations Act of 1947 (29 U.S.C.A. Sec. 160 (b), (c), (e) and (f) read as follows:

Complaint and notice of hearing; answer; court rules of evidence applicable

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complain: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any

such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28."

Reduction of testimony to writing; findings and orders of Board

"(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of subsection (a) (1) or (a) (2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is

engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed."

Amendments.—The Labor Management Relations Act, 1947, substituted "the preponderance of" for "all" in the third sentence of Sec. 10(c) above, and added the provisos at the end of the third sentence and the last two sentences. It also amended the fifth sentence to read as above, the sentence having formerly begun:

"If upon all the testimony taken the Board shall be of the opinion that no person named"

Petition to court for enforcement of order; proceedings; review of judgment

"(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the

court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28."

Review of final order of Board on petition to court

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

Title 5, Section 706 of U.S.C.A. (dealing with review of administrative proceedings) reads as follows:

"§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393."

No. 78-5

Supreme Court, U.S.
FILED
SEP 26 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

JAYS FOODS, INC. and NIELSEN BROTHERS CARTAGE CO., INC., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

ROBERT E. ALLEN,
Acting Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5

JAYS FOOD, INC. and NIELSEN BROTHERS CARTAGE CO., INC., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 573 F. 2d 438. The decision and order of the National Labor Relations Board (Pet. App. 36a-90a) are reported at 228 N.L.R.B. 423.

JURISDICTION

The judgment of the court of appeals (Pet. App. 32a-35a) was entered on May 23, 1978. The petition for a writ of certiorari was filed on July 3, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's findings that petitioner Jays Foods, Inc., threatened employees, subcontracted out its delivery operations, and discharged employees, all because of their union activities.

2. Whether the Board's remedial order, as modified by the court of appeals, is reasonable and proper.

STATEMENT

1. Petitioner Jays Foods, Inc. ("Jays") produces and packages snack foods at its Chicago, Illinois, plant. For more than 30 years, Jays used its own truckdrivers and tractor-trailers to deliver its products to distribution centers in the Chicago area and to independent distributors located in four states (Pet. App. 44a-45a).

At the end of June 1975, claiming temporary financial difficulties, Jays obtained the truckdrivers' agreement to a six-month postponement of the wage increase due them on July 1. Some of the truckdrivers subsequently became concerned about the deferral and contacted representatives of Local 705 of the International Brotherhood of Teamsters. Six of the truckdrivers met with Teamsters representatives on September 26, 1975, signed authorization cards, and scheduled a meeting on October 4 between the Teamsters and as many of the other 26 truckdrivers as the six could convince to attend. During the following week, the six truckdrivers tried to persuade their co-workers to attend the meeting (Pet. App. 5a, 51a-52a).

On the day before the scheduled meeting, the president of Jays asked two employees if they intended to attend the union meeting scheduled for the next day and threatened to "close the doors" if the employees signed union

authorization cards (Pet. App. 55a). That same evening, the company vice-president assembled the drivers for a special meeting to announce the immediate granting of the deferred wage increase. At the same time, he said that he had heard that "a few [of the] fellows have contacted a union" and he stated that he would withhold the wage increase from the ringleaders of the union drive if he could identify them (Pet. App. 5a, 53a-55a). During the following days, a company supervisor repeatedly asked various truckdrivers if they had contacted the union. Both the supervisor and an assistant sales manager warned that continued union activity would lead the company president to "sell the trucks," *i.e.*, to contract out the tractor-trailer delivery work (Pet. App. 6a, 57a-60a).

Shortly thereafter, Jays carried out the threats to dispose of the trucking operations. On October 9, the Company agreed to sell its trucks and subcontract its delivery operations to petitioner Nielsen Brothers Cartage Co., Inc. ("Nielsen"). A month later, three days before the agreement became effective, Jays discharged all its truckdrivers (Pet. App. 63a, 70a). Nielsen immediately hired 15 of Jays' 26 truckdrivers. At that time, however, Nielsen did not hire most of the leading union proponents, even though almost all of them were among the more senior drivers at Jays. Nielsen later hired eight of the remaining 11 former Jays drivers (Pet. App. 6a-7a).

The decision to transfer the trucking operations was made after only a superficial cost comparison based on Nielsen's estimated charges for just one week's trucking operations. Jays' officials admitted that at the time of the decision to subcontract they were uncertain as to how great a savings would result from the new arrangement

(A. 920, 1049).[1] They also testified that they were concerned about having to pay union scale and becoming involved in expensive, time-consuming litigation with the Teamsters (Pet. App. 66a-67a). Jays had previously refused numerous offers to handle its delivery business from established cartage firms in the Chicago area. Only a few months earlier, the Company had rejected an offer from Nielsen. And even at the time when the company was claiming that financial problems required deferral of the drivers' wage increase, it refrained from contacting any of the interested cartage firms (Pet. App. 60a-61a).

Jays also employs driver-salesmen who deliver its goods in assigned territories from the branches to the individual retail stores (Pet. App. 45a). Edward Olson, who had been a salesman at Jays' West Branch for more than 20 years, contacted representatives of the Retail Clerks Union in the spring of 1975 about organizing the company's salesmen. He openly distributed authorization cards at the West Branch where he worked, obtaining signatures from a majority of his co-workers. He organized a union meeting, discussed the meeting with many of his fellow salesmen, and served as the union observer at the West Branch during the October 2 Board-conducted representation election, which the union lost. Shortly after the election, the company vice-president directed the assistant branch manager to "follow Olson [on his route] because he was prounion" (Pet. App. 73a, 74a, 81a).

On December 1, 1975, Olson was discharged without warning. Jays stated that he was fired because he failed to

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[1] "A" refers to the joint appendix filed in the court of appeals.

deliver products to two of his accounts on the Friday after Thanksgiving and because his sales volume was low (Pet. App. 78a).

2. Charges were filed with the National Labor Relations Board alleging, *inter alia,* that petitioners had violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), 158(a)(3), by threatening employees with loss of benefits and jobs because of their union activities, by selling the trucks and discharging its 26 truckdrivers, by discharging Olson because of his union activities (Pet. App. 43a). After a hearing, the administrative law judge held that Jays had violated the Act by ceasing its delivery operations, selling its trucks, and contracting out its delivery operations to Nielsen; by discharging the 26 truckdrivers because of employee union activities; by threatening to sell its trucks and close its doors because of the employees' union activities; and by discharging Olson because of his union activities.

The administrative law judge concluded that the contracting out was motivated by anti-union animus rather than legitimate business considerations. The judge found particularly compelling the evidence that the company had not seriously considered subcontracting its delivery operation until after the inception of union activity among the drivers (Pet. App. 63a, 70a). Pointing to the threats made to the drivers and the company's own testimony that the prospect of unionization was a factor in the decision to shut down the delivery operation, the judge explained (Pet. App. 70a):

> I have no doubt that some dollar savings may be realized by [Jays]. I do not believe, however, that Jays would have departed from 35 years of highly successful business practices, abandoning its

complete control over a complex delivery system, involving speedy, dependable delivery of fragile, perishable products which require special handling by experienced personnel, but for the advent of the drivers' effort to bring the Teamsters into the operation.

With respect to Olson's discharge, the administrative law judge noted that Olson had never missed deliveries in the past and that another salesman who missed a Friday delivery was neither criticized nor disciplined by Jays (Pet. App. 82a, 76a and n. 32). He further found that while Olson's dollar volume of sales was consistently low, it was not consistently the lowest in the branch, as alleged by Jays. Moreover, the various routes differed substantially in size and sales potential; there was no showing that Olson failed to realize his route's potential; and Olson's successor also ranked very low in weekly sales volume (Pet. App. 79a-80a). The judge added that in spite of Olson's relatively poor performance "there is no evidence that Olson was in any danger of losing his job prior to his activities on behalf of the Union and his serving as one of the observers at the election on October 2" (Pet. App. 82a).

As a remedy, the administrative law judge recommended that Jays be required to offer Olson reinstatement to his former job or a substantially equivalent job with back pay and other benefits. The judge also recommended that Jays be ordered to cease and desist from various violations of Section 8(a)(1) and 8(a)(3) of the National Labor Relations Act and that it make the dismissed truckdrivers whole from the time of their discharge until they secured substantially equivalent employment (Pet. App. 84a-89a). The judge did not recommend that Jays be ordered to resume its delivery operation and reinstate the truckdrivers, as requested by

the general counsel, but he recommended that if Jays resumed the delivery service, the former truckdrivers should be offered reinstatement (Pet. App. 86a).

The Board upheld the findings of the administrative law judge and adopted the remedial provisions he recommended, except that the Board ordered Jays to resume the delivery services that it had contracted out to Nielsen (Pet. App. 36a-37a).

The court of appeals held that the Board's unfair labor practice findings were supported by substantial evidence (Pet. App. 12a). It upheld the Board's decision and enforced its order except for the provision requiring Jays to resume its delivery operation. The court agreed with the administrative law judge that under the circumstances it would be improper to impose that requirement on the parties (Pet. App. 14a). It therefore modified the Board's order to conform to the administrative law judge's recommended order (Pet. App. 13a-15a).[2]

ARGUMENT

1. Petitioners argue that the Board's findings that Jays was motivated by anti-union considerations when it discontinued its distribution operation and discharged Olson are not supported by substantial evidence. In so arguing, petitioners quarrel with the administrative law judge's credibility resolutions (upheld by the Board) and contend that he (and the Board) drew inferences that are not supported by the record. These assertions, which raise

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[2]The court concluded that the Board's order might impose a hardship on Nielsen and on the 23 truckdrivers employed by Nielsen, who were receiving better wages from their new employer (Pet. App. 14a).

purely factual questions, do not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.[3]

In any event, the administrative law judge carefully explained his credibility resolutions (Pet. App. 53a-54a, 56a, 57a n. 10, 58a, 59a n. 13, 62a-63a, 66a-67a, 77a, 81a, 81a-82a), and the court of appeals was plainly correct in refusing to upset the Board's adoption of them. *National Labor Relations Board* v. *Walton Mfg. Co.*, 369 U.S. 404, 408; *National Labor Relations Board* v. *Pittsburgh S.S. Co.*, 337 U.S. 656, 659-660. Moreover, direct evidence of unlawful motive is rarely available, and it is well settled that "the trier of fact may infer motive from the total circumstances provided." *Shattuck Denn Mining Corp.* v. *National Labor Relations Board*, 362 F. 2d 466, 470 (C.A. 9).

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[3]There is no merit to petitioners' contention (Pet. 10-21) that the court of appeals misapplied the *Universal Camera* substantial evidence standard. Contrary to petitioner's claim (Pet. 15-16), neither the Act nor *Universal Camera* require a reviewing court to assess the Board's findings according to the "preponderance of the evidence" standard. Section 10(c) of the Act, 29 U.S.C. 160(c), on which petitioners rely (Pet. 5), requires the *Board* to meet that standard in finding a violation; it does not set the standard for review of the Board's findings. Petitioners further complain, in essence, that the court of appeals should have reviewed the evidence *de novo* (Pet. 18). That type of inquiry was expressly disapproved in *Universal Camera, supra*, 340 U.S. at 488. Petitioners' further assertion (Pet. 12-15) that the courts articulate the substantial evidence standard in various ways merely confirms Justice Frankfurter's observation that "the precise way in which courts interfere with agency findings cannot be imprisoned within any form of words * * *" (340 U.S. at 489).

service two customers on one occasion was sufficiently serious to deny him reinstatement. Clearly it was not. See, *e.g., National Labor Relations Board* v. *Yazoo Valley Electric Power Ass'n*, 405 F. 2d 478, 480 (C.A. 5). The court of appeals detailed the circumstances surrounding Olson's alleged defaults (Pet. App. 4a-5a); those circumstances suggest that both failures to service stores were excusable. In the first instance he attempted to service the store but was prevented from doing so because he arrived 10 to 20 minutes after the store's receiving hours. In the other instance, he was unable to service the store because the store already had a full stock of Jays' products.

As to petitioners' challenge to the portion of the order requiring Jays to offer its former truckdrivers reinstatement should it terminate its arrangement with Nielsen and to make them whole for any losses stemming from their release by Jays (Pet. 67-68), the court of appeals properly concluded that this remedy was necessary to recompense the truckdrivers for the effect of the unfair labor practices committed by Jays. The court modified the Board's order in an effort to avoid imposing possible hardship on Jays, Nielsen, or the truckdrivers. Further modification of the order so as to free Jays from the link with Nielsen or to place an arbitrary time limit on Jays' make-whole obligation would fail to accord adequate protection to the employees discriminated against by Jays.

2. Petitioners' objections to the remedial order similarly raise no issue warranting further review. Petitioners contend that the court of appeals should have denied the Board's order reinstating Olson (Pet. 67). The only issue raised by this contention is whether Olson's failure to

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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